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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term 1984

LEROY STEWART,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,
GARY D. NUSS, and ROCKWELL
INTERNATIONAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review in this Petition:

1. Did the Court of Appeals err in affirming the summary judgment against Petitioner?

2. Did the Court of Appeals err in holding that Respondent United States was covered by workmen's compensation insurance pursuant to 40 U.S.C. 290?

PARTIES TO THE PROCEEDING

The Parties are as set forth in the caption. Respondents were the defendants in the lower court proceedings.

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 716 F.2d 755(1982). A copy is set out in the Appendix, infra at p. 26. The denial of the petition for rehearing is set out in the Appendix, infra at p. 62. The decision of the United States District Court for the District of Colorado is not reported, but is set out in the Appendix, infra at p. 63.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 28, 1982. The petition for rehearing was denied on May 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c).

STATUTORY PROVISIONS INVOLVED

Various provisions of the Colorado Workmen's Compensation Act are involved in this case. These will not be set forth verbatim at this point. Those necessary for resolution of this Petition are set forth either in the body of this Petition or in the Appendix, infra at p. 68.

STATEMENT OF FACTS

Petitioner is a former employee at the Rocky Flats Nuclear Weapons Plant, which is located northwest of Denver, Colorado. He was an employee of Rockwell International and was involved in the manufacturing of nuclear weapons, though his exact job description is classified, and his job duties are unknown to counsel.

On May 20, 1976, Petitioner arrived at the parking lot at that plant at 7:06 a.m. He opened his car door, stepped out, and reached for his lunch pail in the car. Before he could turn around, he was crushed between his own vehicle and a car driven by Respondent Nuss and owned by Respondent United States of America(Vol.VII, p. 22). Petitioner suffered massive injuries. He spent several weeks in the hospital, later lost his right leg in 1979 as a result of the accident, and has not worked a day since the accident. He remains totally disabled at the time of the writing of this Petition.

Petitioner had been employed at the plant since 1958. This plant is owned by Respondent United

States. Respondent Rockwell took over the day-to-day operations of the plant in 1975. At the time of the accident, no investigation was done by law enforcement officials of the State of Colorado or any Federal agency. The report of Respondent Rockwell established that Respondent Nuss had fallen asleep. There has never been any dispute that Petitioner was merely exiting his vehicle at the time of the accident(Vol.VII, p. 22).

After the accident, Petitioner filed a claim under the Federal Tort Claims Act(28 U.S.C. 2671, et. seq.)(hereafter FTCA). No action was ever taken on the claim, and the initial complaint was filed with the United States District Court for the District of Colorado. After a period of time, it became known to Petitioner that the Rocky Flats Plant was operated on a daily basis by Respondent Rockwell. The complaint was then amended to include Respondents Rockwell and Nuss.

The documents of record established that several material factual issues exist. The lower courts dismissed Petitioner's amended complaint on

summary judgment on the basis that he was precluded from pursuing any remedy except workmen's compensation. The record reflects that Petitioner carpooled with two other workers and either drove or rode with them every morning(Vol.VII, p.11). He normally traveled from his home to work on roads in the western suburbs of Denver. He would then enter through the eastern gate at the plant(Vol.VII, p. 12-13). A cursory check of badges was made at that gate. Petitioner would then park his vehicle, as occurred on the date of the accident.

The parking lot outside of Building 750 is where the accident took place. Petitioner had no assigned parking place nor was he ever given an authorization sticker. The parking lot was outside of the final checkpoint where badges were checked. At the time of the accident, Petitioner was exiting his vehicle and had not yet gone into the secured area. He was still in transit to his work. Respondent Nuss was an employee of Respondent Rockwell, acting in the capacity of a security guard. There never has been a question about Nuss' negligence.

Other facts necessary for resolution of this Petition will be set forth in argument. It is sufficient to say that the defenses raised by Respondents all revolved around workmen's compensation as a bar to Petitioner's action.

STATEMENT OF THE CASE

After the accident, Petitioner filed a claim under the FTCA. This was filed with the United States Department of Energy which had assumed jurisdiction over the Rocky Flats Plant from previous government agencies. Nothing ever was done on the claim, and after six months had elapsed, Petitioner filed his initial complaint with the District Court. See 28 U.S.C. 2675(a). This complaint named only Respondent United States, as it was presumed that the plant was owned and operated by the Government.

After some discovery, it became known to Petitioner that the plant was owned by the United States, but that a contract was in effect which placed the day-to-day operation in the hands of Respondent

Rockwell International, Inc.(hereafter Rockwell). The amended complaint named Respondent Rockwell on the basis of diversity jurisdiction and Respondent Nuss on a pendent claim. Though the Court of Appeals appeared concerned about jurisdiction, that has never been an issue between the parties. It finally concluded that jurisdiction was proper (Appendix, infra at p. 34).

When discovery was completed, Respondents Rockwell and Nuss moved for summary judgment on the basis that Petitioner's claim was precluded by the Colorado Workmen's Compensation Act. They alleged that he had no other recourse, as he was covered on the parking lot and therefore could not sue either party. The District Court agreed and granted summary judgment (Appendix, infra at p. 63). This was affirmed by the United States Court of Appeals (Appendix, infra at p. 26).

After the granting of summary judgment, the District Court held a status conference. At that time, Respondent United States moved for the dismissal of the claims remaining against it. This was granted on the basis of failure to state a claim, with

Respondent United States being allowed to claim the same immunity as the other Respondents. The Court of Appeals correctly treated the review of this issue as one of summary judgment, rather than a motion to dismiss (Appendix, infra at p. 57). The result was the same, as the Respondent was allowed to use the Colorado Workmen's Compensation Act as a bar to the action brought under the FTCA.

The Court of Appeal's decision was issued on December 28, 1982. A petition for rehearing was filed promptly. The denial of the petition for rehearing was not entered until May 23, 1984 (Appendix, infra at p. 62). This Petition for Writ of Certiorari now follows.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT AGAINST THE PETITIONER.

The issue here involves the misapplication of Rule 56, Federal Rules of Civil Procedure, as well as provisions of the Colorado Workmen's Compensation Act(hereafter Act). This issue and that in Argument

II are intertwined.

Summary judgment was granted by the District Court on the basis that Petitioner had no remedy other than workmen's compensation. Little is set forth in that order as to reasoning (Appendix, infra at p. 63). The Court of Appeals affirmed, though conceding that Colorado law was perhaps not as clear-cut as thought by the trial court. It held that the ruling of the District Court was proper(Appendix, infra at p.45-46). The question before both courts was one of fact, not properly decided as a matter of summary judgment.

Summary judgment is to be granted when there is no disputed issue of fact. Rule 56, Fed.Rules of Civ.Proc. With a showing of factual dispute, summary judgment should not be granted. The burden is upon the party moving for summary judgment to show that there is no factual dispute. Both lower courts acknowledged that the applicable Colorado law mandates a showing of a connection between the injury and employment. C.R.S. §8-52-102. These courts further acknowledged that the applicable rule of law in Colorado is that travel to and from work is not considered work related, absent a showing of special circumstances(Appendix, infra at p.40).

See Rogers v. Industrial Commission, 40 Colo.App.313, 574 P.2d 116(1978). Recent decisions have again stressed that the burden is upon a workmen's compensation claimant to show a causal relationship between his or her work and the injury. Mineral County v. Industrial Commission of Colorado, 649 P.2d 728(Colo.App. 1982). Travel to and from work is not compensable, absent special circumstances. Colorado Civil Air Patrol v. Hagans, 662 P.2d 194 (Colo.App. 1983); also see Martin K. Eby Construction Co. v. Industrial Commission, 151 Colo. 320, 377 P.2d 745(1963). Further, an accident in a parking lot is not in and of itself sufficient to establish causal relationship. Matter of Welham, 653 P.2d 760 (Colo. App. 1982). As Respondents have conceded in the past, the parking lots were not used only for employees. This was acknowledged by the Court of Appeals (Appendix, infra at p.35). Nor has there ever been a formal adjudication of liability, as Respondent Rockwell filed an admission almost immediately (Appendix, infra at p.36). Respondents were not unaware of the massive exposure facing them, and workmen's compensation gave to them an expedient

means of trying to avoid it.

The question then becames one of why this Court should grant this Petition. Aside from the massive suffering of Petitioner, the reasons are these. First, both the Court of Appeals and District Court misapplied state law. This Court has the power, indeed duty, to correct such misapplication. The decisions of the lower courts presumed causal connection under the Colorado Workmen's Compensation Law. But see Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542(1981); Kandt v. Evans, 645 P.2d 1300(Colo. 1982).

Second, the lower courts have misapplied the standard for summary judgment under Rule 56. A reading of both opinions clearly indicates that there was a resolution of facts. This is contrary to the standard for summary judgment. The issue of workmen's compensation is one of an affirmative defense, to be considered by the finder of fact. See Silkwood v. Kerr-McGee Corp., __U.S.__, 104 S.Ct. 615(1984). Resolution of any disputed facts will require a trial, not a grant of summary judgment.

Respondents have believed that they could pick and choose which Colorado statutes could be used at the plant site. The plant location is totally federally owned land, a point not disputed by Respondents. There is no indication in the Colorado Act that it is applicable on a federal reservation. Indeed, there is some question that the Colorado Legislature would have such authority. More will be discussed about this point in the second Argument. Likewise, Respondents may not pick and choose which statutes are then applicable. See C.R.S. 42-4-1401, et seq.(Colorado law enforcement officials will be contacted whenever there is a motor vehicle accident anywhere within the State, and this was not done in this case).

Respondent United States has not filed an election as mandated by the Act. In effect, Respondents have engrafted onto a federal reservation a state act which they find beneficial when facing a massive negligence case. Then they raise it as a preclusion of all other available remedies. The opinions of the lower courts expand a state compensation act without benefit of legal basis.

From this flows the result that Petitioner is therefore precluded from bringing his action because of this expanded coverage. This simply is not correct, and even more so in light of the misapplication of the Colorado Act itself.

The result reached by the lower courts runs counter to Rule 56, Federal Rules of Civil Procedure, as well as state law. It would be perhaps easy to simply brush aside this issue, but to do so would allow a precedent neither mandated by law nor supported by the record. Summary judgment was inappropriate in this case, as there was no causal connection with employment. This Court should grant this Petition and reverse the Court of Appeals, directing that a trial take place in this case.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT UNITED STATES WAS COVERED BY WORKMEN'S COMPENSATION INSURANCE.

Even more puzzling is the rationale of the Court of Appeals in affirming the dismissal of the United States as a defendant. It did not reach the issues raised by Petitioner, but rather held that the Respondent United States could utilize the workmen's

compensation coverage of Respondent Rockwell to escape liability. This ruling is an incorrect application of federal law.

The Rocky Flats Plant is a nuclear weapons production facility. The land upon which it sits is under total federal jurisdiction, a point conceded by Respondents. The entire production facility is owned by Respondent United States. 42 U.S.C. 2061. Indeed, the very intent of Congress precludes anything but ownership by the Government. Respondent Rockwell could not be a truly independent contractor due to the nature of the production facility. This is not a case controlled by United States v. Orleans, 425 U.S. 807 (1976). The Court of Appeals recognized this, but found that the mere fact that Respondent Rockwell had workmen's compensation coverage allowed Respondent United States to claim employer or landlord status, which would then preclude any liability under the FTCA. This analysis is incorrect and an impermissible extention of the law.

The Court of Appeals' analysis presumes applicability of workmen's compensation coverage.

From this flows the further assumption that Colorado law will allow the Respondent United States to claim statutory employer status. C.R.S. §8-48-101(1) & (2). The Court of Appeals also found that the FTCA specifically allowed such a defense to be raised. 28 U.S.C. 1346(b) and 2674. All of this reasoning was predicated on the assumption that Colorado law is applicable at the Rocky Flats plant and binding upon all parties. It should be noted that Respondent United States has not elected coverage. This the Court of Appeals did not feel was dispositive (Appendix, infra at p.51-52). It further ruled that the applicability could be predicated on 40 U.S.C. 290. Richardson v. United States, 577 F.2d 133 (10th Cir., 1978). The question about the import of this last cited statute has yet to be resolved by this Court, and lower court decisions have lead to confusion. See Roelofs v. United States, 501 F.2d 87 (5th Cir., 1974), cert.den. 423 U.S. 830; but see Peak v. Small Business Administration, 660 F.2d 374 (8th Cir., 1981).

The rationale of the Court of Appeals carries this result far beyond applicable law or case decision. The provisions of the Colorado Act do not include Respondent United States, its employees, or land totally under its jurisdiction. C.R.S. 8-41-105.

The error in the lower court's ruling is multifacited. First, the Atomic Energy Act precludes Respondent United States from turning over control of the Rocky Flats Plant to any private contractor. 42 U.S.C. 2061. Unlike the normal contract which would be entered into between the Government and a private contractor, the very nature of the production at the Plant mandates that Respondent United States be the employer, with control over production, facilities, and personnel. This has been provided by Congress in the previously cited statute. Respondent United States is the employer in this case, not Respondent Rockwell.

Second, Respondent Nuss' status as a security guard makes him an express employee and agent for Respondent United States. 42 U.S.C. 2201(k). Though this case was resolved on summary judgment,

the record reflects that Respondent Nuss was driving a security vehicle owned by Respondent United States and was acting in his position as a security guard. This has never been disputed. The status of Respondent Nuss was then one of a direct Government agent, not as an employee of an independent contractor. The negligence of Respondent Nuss was thus transmitted to Respondent United States.

Third, the Court of Appeals' extension of 40 U.S.C. 290 is unwarranted and improper. This statute is cited, in part, in the Appendix, infra at p.68. The lower court apparently believed that this statute was self-executing, and therefore applicable to the Rocky Flats Plant. Nowhere in 40 U.S.C. 290 is there any indication as to whom the law is applicable. At least one Court of Appeals has held that this section does not impose a duty on Respondent United States. See Peak v. Small Business Administration, supra. Indeed, it would seem difficult to believe that Congress intended this statute to apply to federal employees. See 5 U.S.C. 8101, et.seq.; also see Breeding v. Tennessee Valley Authority, 243 Ala. 240, 9 So.2d

6(1942). Further, Congress could not impose upon the several states automatic coverage under their workmen's compensation laws. It would incumbent upon the several states through appropriate legislation to extend these acts to include exclusively federal jurisdictions. The Colorado Legislature has taken no such step. See C.R.S. 8-41-105(definition of employers); C.R.S. 8-41-106(definition of employees).

The Court of Appeals reasoning from 40 U.S.C. 290 allows Respondent United States to use this as a means of avoiding liability. To do so requires applicability of the Act at the plant. As this Court has said only recently, there must be a careful reading of Congressional intent, particularly if there is a question as to other remedies. See Silkwood v. Kerr-McGee Corporation, supra. The immunity granted to an employer from a workmen's compensation law will require narrow contruction, as well as a careful examination of the applicable law. See Washington Metro Area Transit Auth. v. Johnson, __U.S.__, 104 S.Ct. 2827(1984); also see Potomac Elec.Power Co. v. Director, 449 U.S. 268(1980). The reliance by the

Court of Appeals upon 40 U.S.C. 290 is misplaced, and an erroneous interpretation and extension of that statute.

Third, the Court of Appeals held that Respondent United States was a statutory employer under C.R.S. 8-48-101(2), and thus entitled to claim immunity from a subcontractor. This is inconsistent with the position advanced throughout by Respondents, that being that a true independent contractor status existed. C.R.S. 8-48-103. On the other side of the coin, the Court of Appeals' ruling means that Respondent United States would be directly answerable under the Act if no compensation coverage existed. See Standard Oil Company v. Industrial Commission, 38 Colo.App. 39, 552 P.2d 1029(1976). No authority exists for this proposition. In either case, the ruling of the lower court is neither consistent with the law nor facts in this case.

Finally, the nature of the record at this point precluded summary judgment as to Respondent

United States. Respondent Nuss was acting in his capacity as security guard. As has been shown, he was an agent of Respondent United States pursuant to 42 U.S.C. 2201(k). He was in a security vehicle owned by Respondent United States. Respondents have argued that the Government contracted with Respondent Rockwell for a turnover of everything, including vehicles. This is legally impossible under 42 U.S.C. 2061. This line of reasoning allows Nuss to be considered as a co-employee and therefore immune from any action dealing with his negligent acts. The position of Respondent Nuss was different from that of a fellow employee. He was not a fellow employee, and therefore not immune from suit. See generally Frohlick Crane Service, Inc. v. Mack, 182 Colo. 34, 510 P.2d 891(1973).

The Court of Appeals' reasoning stretches the applicable statutes beyond their breaking point. To reach the point of allowing immunity to Respondent United States, the lower courts had to find a binding effect of the Act on federal reservations. No such authority exists, absent an explicit state declaration that its workmen's compensation act will apply on

exclusive federal jurisdiction properties. No such grant exists in Colorado. Further, Respondent Nuss was acting as an agent of the Respondent United States. He was driving a Government car, had arrest authority conferred by Congress, and was acting in the capacity of security guard. The granting of the motion to dismiss/motion for summary judgment was improper.

CONCLUSION

The issues in this case appear to be easier than they are. The lower courts could discern that substantial injuries are present, and the negligence of Respondent Nuss is not open to question. The only available defense is that of raising workmen's compensation as a bar. This was relied upon by both lower courts, with the application of 40 U.S.C. 290 by the Court of Appeals. As has been shown, the Colorado Legislature has not specifically directed that its Act apply on federal reservations. There is no legal support for the rationale of the lower courts.

Even if the Act applied, the lower courts have misapplied the law. Petitioner was in transit to his work at the time of the accident. He merely

reached back into his car for his lunch pail. There is no causal connection between his massive injuries and his work, as required under Colorado law. Merely being in a parking lot is not enough. Further, the issue of workmen's compensation as a bar to civil litigation is a matter to be resolved at trial, not on a motion for summary judgment. The disputes that exist in the record may not be resolved except at a trial.

This Court should grant the Petition and reverse the decision of the Court of Appeals. This matter should be set for trial.

Respectfully submitted,

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APPENDIX-OPINION OF U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEROY STEWART,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v	)	No. 80-1329
	)	
UNITED STATES OF AMERICA, GARY D. NUSS, and ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation,	)	
	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. Civil 78-K-1061)

Richard M. Borchers, Westminster, Colorado(John E. Joslin, Kansas City, Missouri, was on the brief) for Plaintiff-Appellant

James E. Elliott, Jr.(Elliott, Martinez & Allman, Denver, Colorado, was on the brief) for Defendants-Appellees Rockwell International Corporation and Gary D. Nuss

Jake J. Chavez, Assistant United States Attorney (Joseph F. Dolan, United States Attorney, and Donald M. Hoerl, Assistant United States Attorney, Denver, Colorado, and Jan Elizabeth Mitchell, United States Department of Energy, Albuquerque, New Mexico, were on the brief) for the Defendant-Appellee United States of America

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Before SETH, Chief Judge, and HOLLOWAY and McKAY, Circuit Judges

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HOLLOWAY, Circuit Judge

In this suit brought against the United States under the Federal Tort Claims Act (FTCA), plaintiff-appellant Leroy Stewart appeals a dismissal as to the defendant United States and a summary judgment granted for defendants Gary Nuss(Nuss) and Rockwell International Corporation(Rockwell), also named as defendants. Plaintiff seeks damages for personal injuries incurred in a parking lot accident at the Rocky Flats nuclear weapons facility in Colorado, owned by United States and operated by Rockwell, charging negligence against all defendants. The injury is alleged to have occurred on May 20, 1976, when plaintiff was struck, while exiting his car in the parking lot on arrival for work, by a Government vehicle driven by Nuss, who was on a security patrol.

I.

Plaintiff originally sought relief solely against the United States under the FTCA, 28 U.S.C. §2671 et seq. and 28 U.S.C. §1346(b). His amended complaint also named Rockwell and Nuss as defendants. The amended complaint asserted jurisdiction pursuant

to the FTCA. It also claimed diversity jurisdcition as to Rockwell and pendent jurisdiction as to Nuss. Defendants have not challenged subject matter jurisdiction as to any of the claims except by a formal denial earlier in the answer of Rockwell and Nuss of pendent jurisdiction as to Nuss.(See note 2, infra).

However as we must, we note that there is a question as to whether pendent jurisdiction is proper as to a non-diverse party such as Nuss. See, e.g., Ayala v. United States, 550 F.2d 1196(9th Cir.). Moreover, we have also noted, sua sponte, that the amended complaint failed to aver the principal place of business of Rockwell, which prevented reliance on diversity jurisdiction as to the corporation at that point. American Motorists Ins. Co. v. American Employers' Ins. Co., 600 F.2d 15(5th Cir.); Walsh v. International Precious Metals Corp., 510 F.Supp 867, 873(D.Utah); see Fed.R.Civ.Proc., 8(a)(1)(requiring a short and plain statement of grounds of jurisdiction). We requested supplemental briefing from the parties on the question of whether there was proper subject matter jurisdiction of the claims against Rockwell

and Nuss. The supplemental brief of Rockwell and Nuss noted that Rockwell's diversity of citizenship was never questioned below and suggested that Rockwell be treated as diverse. Rockwell's supplemental brief included an affidavit stating that its principal place of business is in Pennsylvania. The Government submitted a statement on jurisdiction which adopted the position of Rockwell and Nuss. On consideration of the supplemental briefs, the affidavit and the Government's statement, we will treat the matter as an unopposed motion to amend the complaint to cure the defective diversity allegation as to Rockwell, which we grant. 28 U.S.C.A. §1653; 3 Moore's Federal Practice §15.11(2d ed. 1982).

The question remains whether there is proper subject matter jurisdiction of the claim against Nuss as a matter of pendent jurisdiction. By their supplemental statements on jurisdiction, filed by the parties at the direction of the court, all the parties take the position that the district court properly exercised pendent jurisdiction over Nuss. The question

is, however, "subtle and complex," Aldinger v. Howard, 427 U.S. 1,2, and we feel we must note and carefully decide it because it touches on constitutional and statutory foundations of jurisdiction.

Jurisdiction of the claim as to Nuss involves more than just the assertion of two claims, one federal and one non-federal, in litigation between the same parties plaintiff and defendant. E.g. Hurn v. Oursler, 289 U.S. 238; United Mine Workers v. Gibbs, 383 U.S. 715. The asertion of a separate claim arising out of the same operative facts concerning conduct of the same parties, but as a pendent claim against an added party, implicates the so-called "pendent party" problem where jurisdiction was held lacking as to the pendent party in Ayala v. United States, 550 F.2d 1196(9th Cir.), in an FTCA case. The problem involves both Article III constitutional power and the statutory basis for such jurisdiction. See Aldinger v. Howard, 427 U.S. 1,18.

We note that plaintiff's complaint is based on the single accident in the Rocky Flats parking lot. Further, the claim against the United States under the

FTCA properly invoked the subject matter jurisdiction conferred by that Act exclusively on the federal district courts. And we are satisfied that the claim asserted under the FTCA has sufficient substance so that it was proper to invoke that jurisdictional grant. To these circumstances we apply the guidelines laid down in Gibbs which are instructive here in deciding the pendent party question:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constition, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...." U.S. Const., Art.III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garriques Co. v. Morrin, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. 383 U.S. at 725.(emphasis in original)(footnotes omitted).

We are persuaded that under these concepts subject matter jurisdiction of the claim against Nuss exists, pendent to that of the claim under the FTCA against the Government, in accord with the constraints of Article III. Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023, 1024 n.1(5th Cir.), cert.denied, 440 U.S. 908; Johnston, et al. v. United States, et al., 546 F.Supp 879(D.Kan.); Dumansky v. United States, 486 F.Supp 1078, 1086-89(D.N.J.); Pearce v. United States, 450 F.Supp 613, 619(D.Kan.); Maltais v. United States, 439 F.Supp 540, 547 (N.D.N.Y.); cf.Florida East Coast Railway Co. v. United States, 519 F.2d 1184(5th Cir.); Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1154-55 (10th Cir.), cert.denied, 435 U.S. 1006; State of New Mexico v. Molybdenum Corp. of America, 570 F.2d 1364, 1367 (10th Cir.). Contra, Kack v. United States, 570 F.2d 754(8th Cir.); Ayala v. United States, 550 F.2d 1196 (9th Cir.), cert.dismissed per stip., 435 U.S. 982; Falk v. United States, 264 F.2d 238(6th Cir.). While Aldinger rejected pendent jurisdiction in the context of a claim principally asserted under §1983, the Court

noted that different considerations apply where there is a case like this one under the FTCA which confers exclusive jurisdiction on the federal court[1]:

> Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. §1346, the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together....

427 U.S. at 18(emphasis in original).

Moreover, we find no congressional disapproval of the exercise of such pendent party jurisidiction in the FTCA. The waiver of immunity, granting jurisdiction to the federal district courts of such tort suits against the Government, was made in "sweeping language." United States v. Yellow Cab Co., 340 U.S. 543, 547. Moreover the grant of jurisdiction was made exclusively to the federal courts. Thus there is no indication that Congress declined to extend federal jurisdiction over such a pendent party as was the case in Aldinger. See 427 U.S. at 16-19.

We hold, therefore, that subject matter jurisdiction in the district court existed of the claim against Nuss as one over which the district court properly exercised jurisdiction, pendent to the claim against the Government under the FTCA over which the federal court has exclusive jurisdiction.[2]

II

Most of the facts concerning the accident and the workmen's compensation defenses are undisputed and can be stated briefly.

On the morning of May 20, 1976, plaintiff left for work and picked up two co-employees who shared a car pool with him. Plaintiff's employment at this time was as a probe and cable fabricator. By rotating the driving duties, plaintiff drove his car approximately every third day. The routine of the car pool was to arrive at the Rocky Flats plant in time to have coffee and change into work clothing before the beginning of their 7:30 a.m. shift.

Plaintiff was not being paid for work at the time of the accident and pay was not to start until 7:30 a.m. As the riders approached the plant, they

passed through a security checkpoint where they displayed their indentification badges to security personnel. They continued to Parking Lot No 50 where they were to leave the car and pass a final security checkpoint before entering Building No. 750 to change clothes. Parking places were unassigned in the parking lot, which was used because it was most convenient. The lot was used by persons other than plant employees.

They parked in Lot No. 50. Plaintiff's riders left the car and he stepped out of the automobile. As he reached back into the car for his lunch pail, he was crushed against the car by a Government vehicle. This occurred at about 7:06 or 7:08 a.m.[3] Plaintiff suffered compound fractures of both ankles, a tibia plato fracture of the right leg, and a deep laceration of the upper left thigh about twelve inches long. In August 1979 plaintiff's right leg was amputated, a procedure necessitated by osteomyelitis. His medical expenses have exceeded $75,000.

Defendant Gary Nuss was the driver of the

Government vehicle. He was employed in the Rockwell Plant Protection Department and was performing his regular guard duties near the end of his midnight shift. An investigation revealed that he had fallen asleep at the wheel of the vehicle. The parties agree that Nuss was acting within the course and scope of his employment at the time of the accident.

Four days after the accident(May 24, 1976), Rockwell filed an accident report with the Colorado Division of Labor(the Division). In June 1976 Traveler's Insurance Company(Traveler's), Rockwell's workmen's compensation carrier, submitted an admission of liability for the accident to the Division. In October and November of that year, plaintiff lodged an accidental injury claim for compensation and an "Election of Remedies" with the Division, electing workmen's compensation coverage. He received benefits from both Traveler's and Social Security.

The Rocky Flats installation is situated on a 6500 acre tract owned by the United States in fee simple for the sole purpose of fabricating nuclear weapons parts.(United States v. State of Colorado, 460

1184, 1186(D.Colo.); II R.53). Though the actual operation of the plant is accomplished through private companies under management contracts, no work on behalf of any private entities is undertaken there. Since June 1975 the plant has been operated under a management contract with Rockwell, which is charged with managing, staffing, maintaining, and operating the plant. (II R. 67,70). Under the management contract the Department of Energy provides all funds to sustain the operation. No money or property of Rockwell is used. The contract with Rockwell provides that persons employed by Rockwell shall not be deemed employees of the Government.(II R. 70).

Under Rockwell's contract with United States, Rockwell is required to maintain workmen's compensation insurance for the benefit of its employees. (II R. 213, 233). The contract provides that Rockwell will receive an annual negotiated fee for its management services in addition to reimbursement for its operating expenses, including the cost of workmen's compensation insurance. (II R. 77, 82).

Plaintiff's complaint averred that the Government, Rockwell and Nuss were all liable for his injuries due to their negligence. After discovery, Nuss and Rockwell filed motions for summary judgment claiming the Colorado Workmen's Compensation Act(Act) barred plaintiff's common law remedy. The Government also sought summary judgment, arguing that its status as a "statutory employer" under the Act freed it of liability on such a claim.

The district court granted summary judgment for Nuss and Rockwell, holding that the Act constituted plaintiff's exclusive remedy. At a subsequent status conference the Government made an oral motion to dismiss for failure to state a claim on which relief can be granted. Fed.R.Civ.P.,12(b)(6). The motion was granted based on the "statutory employer" argument and this timely appeal followed from all these adverse rulings.[4]

Plaintiff urges several grounds for reversal of the summary judgments and dismissal. He contends that under Colorado law injuries incurred by an employee while travelling to and from work are not

compensable under the Act, that plaintiff's common law remedy is not foreclosed, and that material factual issues concerning applicability of the Act prevent summary judgment. Plaintiff also maintains that dismissal as to the United States was improper if the Government, and not Rockwell, was the actual employer. He reasons that, in this scenario, workmen's compensation coverage secured by an employee of the United States (Rockwell) will not insulate the United States from suit. Further, the employer United States must make an election to be covered by the Act, which plaintiff says it has not done. Plaintiff also argues that the Act does not apply to territory owned in fee simple by the United States.

Plaintiff further says that Rockwell improperly influenced his decision to file a claim for workmen's compensation benefits and forego a tort action. Finally, plaintiff claims that the district court's order is defective for failing to satisfy specificity requirements of Rules 56 and 52, Federal Rules of Civil Procedure.

III

Plaintiff first contends that the district court erroneously concluded that his injury arose "out of and in the course of employment" as required by the Colorado Workmen's Compensation Act.[5] Plaintiff argues that this incorrect conclusion resulted in the equally erroneous holding that the Act barred suit against defendants Rockwell and Nuss by virtue of its exclusivity provisions.[6]

Plaintiff correctly notes that, in general, injuries going to and from work are not within the ambit of the Act. Rogers v. Industrial Commission, 40 Colo.App 313, 547 P.2d 116. Absent some special circumstances, plaintiff urges, a parking lot injury sustained before work hours is not causally related to employment as contemplated by the Act.

In factual support of his contention that the Act is inapplicable, plaintiff observes that: (1) he was only exiting his car and had made no move toward Building 750; (2) he was not paid for any time spent changing clothes prior to starting time, though he was paid for time spent changing in the afternoon;

(3) before work commenced he had to clear a final security check; (4) the parking lot was open to persons other than Rockwell employees such as repairmen and spouses picking up employees; (5) use of the lot was not mandatory, and (6) parking spaces within the lot were unassigned.(Appellant's Opening Brief, pp.10-11). These facts indicate, he maintains, that he was still in transit to his workplace at the time of the accident and no causal connection linked his injury to his employment.

The totality of the circumstances must be examined in such case to determine if there is a sufficient nexus between employment and injury to say that the accident occurred within the scope of employment. City & County of Denver School Dist. No. 1 v. Industrial Commission, 196 Colo. 131, 581 P.2d 1162, 1163. Under Colorado law, an injury arises out of and in the course of employment even though incurred on the way to work if special circumstances create a causal connection between the employee's injury and employment. Woodruff World Travel, Inc. v.

Industrial Comm., 38 Colo.App. 92, 554 P.2d 705,707. The Act may encompass injuries received on the premises after work hours, Maintenance Management, Inc. v. Tinkle, 40 Colo.App. 80, 570 P.2d 840(1977) (employee returns to premises without express authority one and one half hours after work), off the premises after work hours. State Compensation Insurance Fund v. Walter, 143 Colo. 549, 354 P.2d 591 (employee walking along public street to assigned parking place from university shop work place), and in the employee parking lot shortly before work started. Sieck v. Trueblood, 29 Colo.App.432, 485 P.2d 134.[7]

Further, Colorado case law indicates that it is not determinative that the employee is not required to arrive at work in a car or that the employer is not obliged to provide parking. Walter, 143 Colo. at ___, 354 P.2d at 594, quoting 99 C.J.S., Workmen's Compensation §234, p.833. It is not decisive that the employer of an injured employee is not the record title owner of the parking lot where the injury occurred. Woodruff, 38 Colo.App.at __, 554 P.2d at 706 (landlord makes parking lot available to tenant's

employees), or that the injured employee was not being paid at the time of the injury. Kitchens v. Department of Labor & Employment, 29 Colo.App. 374, 486 P.2d 474, 475-76(gunshot injury to plaintiff in employer's parking lot just before work commenced). Rather such circumstances are only factors in the decisional calculus. City & County of Denver, 196 Colo. at ___, 581 P.2d at 1163. In all the authorities cited in the proceding two paragraphs, the employee's injury was adjudged work-related.

Plaintiff seeks to distinguish these cases by contending that no causal connection between the employment and injury can be established where the "only thing present was the mere happenstance that [plaintiff] was in the parking lot getting out of his car." (Appellant's Opening Brief, p. 14). Plaintiff argues correctly that the mere presence of the injured employee on the employer's premises is, without more, insufficient to invoke the bar of the Act. Finn v. Industrial Comm., 165 Colo. 106, 437 P.2d 542; Rocky Mountain Fuel Co. v. Kruzic, 94 Colo. 398, 30 P.2d 868; McKnight v. Houck, 87 Colo. 234, 286 P.279.

The Sieck case is instructive on the scope of the Act in this type of case. There the injured employee, a truck driver, arrived at his employer's place of business, a trucking firm, at 7:15 a.m. for a work shift commencing at 7:30. As was his custom(and that of several other drivers), he drove his car across the truck yard to warm up his tractor motor before work. At that time he collided with a truck driven by a co-employee. The Colorado Court of Appeals held that the injury occurred within the scope of employment. The court focussed on the mutual benefit of this conduct to employee and employer, even though the benefit to the employer was slight. 485 P.2d at 135. Accord, Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2; Walsh v. Industrial Commission, 34 Colo.App. 371, 527 P.2d 1180.

In the instant case, plaintiff testified at deposition that his supervisior expected employees to be dressed and ready for work at 7:30.[8] (VII R. 71). Further, Rockwell expected that employees would drive or ride in private vehicles because there was no

other transportation to the plant. (IV R.415). While other uses of Lot No. 50 occurred (IV R.307), plaintiff admits the principal use was for employee parking. (VII R. 51). Both plaintiff and his employuer benefitted from the availability of the lot. See Brogger v. Kezer, 626 P.2d 700(Colo.)(test to determine if injury arises "out of and in the course" of employment is whether acts or employee were solely for his own benefit). The reciprocal benefit and the express or implied direction of plaintiff's supervisor concerning starting time bring this case squarely within the rule of Sieck and other authorities cited above.

The Act is to be broadly and liberally construed to achieve its salutary purposes. Finnerman v. McCormick, 499 F.2d 212, 214(10th Cir), cert denied, 419 U.S. 1049. Chief among the Act's purposes is that the employee is favored with speedy compensation regardless of fault, the employer is granted immunity from common law claims, Frohlick Crane Service, Inc. v. Mack, 182 Colo. 34, 510 P.2d 891, 893, and in return a vicarious statutory

liability is substituted. See generally Thomas v. Farnsworth Chambers Co., 286 F.2d 270, 273(10th Cir.). The district court correctly recognized these purposes by ruling that plaintiff's suit against Nuss and Rockwell is barred by the Act. Sieck, supra, 485 P.2d at 135; Varsity Amusement Co. v. Butters, 155 Colo. 330, 394 P.2d 603. We are persuaded that the ruling was proper in light of the Colorado law.

IV

Plaintiff acknowledges that the Government is not responsible under the Federal Tort Claims Act for liabilities of truly "independent contractors," citing United States v. Orleans, 425 U.S. 807. (Appellant's Opening Brief at p. 18). Plaintiff argues that the question of whether Rockwell is a truly independent contractor is one of fact which cannot be decided on the present record so that the summary dismissal as to the Government was error.

Reaching the substance of the issue, plaintiff further says that the United States retains virtually complete control over production of nuclear weapons because of their very nature. Therefore

Rockwell is only an "alter ego" acting on behalf of the Government. Plaintiff asserts that the United States has not made an election to be covered by the Act as required. Furthermore he says a suit like his is not barred where workmen's compensation coverage is secured by Rockwell as an "alter ego." Finally plaintiff contends the Act does not apply to territory owned in fee simple by the United States. Thus palintiff maintains he is entitled to recover from the Government for negligent supervision of its vehicle and Nuss. (I R.2).

We must reject the argument that genuine issues of fact barred the dismissal as to the Government. We sustain the ruling of the district court without determining whether an "independent contractor" relationship existed in the ordinary sense. We hold instead that on the undisputed facts Colorado law, made applicable under the FTCA, afforded the Government immunity from this action as a "statutory employer" since Rockwell, as required by its contract to perform work for the Government, obtained workmen's compensation insurance which

covered the plaintiff's injury.

The FTCA authorizes suit against the United States for personal injuries inflicted by the negligent or wrongful acts or omissions of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§1346(b) and 2674. Thus plaintiff's right to prevail on the merits of his tort claim turns on the interpretation of Colorado law. The Colorado Workmen's Compensation Act provides, inter alia, a derivative immunity from a negligence suit to anyone who contracts with another for work to be done when the party to whom the work is contracted secures workmen's compensation insurance. C.R.S. §8-48-101(1),(2).[9] The Act declares that the party who contracts the work away shall be construed to be the employer. §8-48-101(1). If the party to whom this statutory employer has contracted work out fails to secure workmen's compensation insurance, the statutory employer is liable to respond in damages to the injured employees of the other party. Edwards v.

Price, 191 Colo. 46, 550 P.2d 856, 860, appeal dismissed, 429 U.S. 1056. This statutory employer immunity was recently at issue in Posey v. Intermountain Rural Electric Ass'n, 41 Colo.App. 7, 583 P.2d 303. There the court stated that a "corporation will be determined to be a statutory employer when it contracts out work which is a part of its regular business and which would ordinarily be accomplished with its own employee," id. at 304, and held the defendant immune from suit.

Plaintiff nevertheless argues that the Government and not Rockwell is the actual empoloyer at Rocky Flats. He relies on the testimony of James Nicks, the Department of Energy assistant area manager for administration for the Rocky Flats area in a criminal trespass case unrelated to the present action.(V. R. 484-500). Mr. Nicks testified that approximately 50 Department of Energy employees are stationed at Rocky Flats, with a third of them involved in monitoring operational aspects of the facility such as inspection and quality control. These facts, plaintiff reasons, demonstrate that the United

States is the actual employer. Therefore, workmen's compensation coverage secured by Rockwell does not shield the Government, especially if it has not made the election to be covered as required by the Act. Plaintiff says that a trial is required to ascertain the Government's exact status and "[p]laintiff would suggest that insurance secured by someone else will not suffice under the Colorado Workmen's Compensation Act so as to preclude a lawsuit." (Appellant's Opening Brief at 19).

Plaintiff does not cite Colorado authority for this proposition. It appears that his interpretation runs against the plain language of §8-48-101(2) itself. See note 9, supra. The Act specifically bars an "action of any kind," inter alia, against the person contracting out the work when the party to whom the work is contracted obtains workmen's compensation coverage. In effect, the Act requires an employer such as the United States to make certain that the party to whom the work is contracted has obtained such insurance or face the risk of suit. In this manner the Legislature has assured that

employers will not evade the protective policy of the Act by contracting with uninsured parties to perform the employer's work. Frohlick Crane Service Inc. v. Mack, 510 P.2d 891, 893(Colo). Colorado case law does not indicate that these duties are imposed solely for the principal-independent contractor relationships as the term is understood in agency law. Rather the statute is intended to cover normal business conducted through the activities of another under various kinds of contractual relationships. Faith Realty & Development Co. v. Industrial Comm., 170 Colo. 215, 460 P.2d 228, 230. This conclusion is supported by the fact that the immunizing provision also extends to lessors and lessees. See n.9, supra.

Plaintiff's argument that the United States has not elected coverage is not persuasive. First, the statutory employer immunity provisions do not speak of an express election. Second, as noted, the United States-Rockwell contract requires Rockwell to maintain workmen's compensation insurance as an allowable operating expense. (II R.213,82). Finally, Rockwell did in fact obtain and maintain such insurance. Moreover, plaintiff's contention that state

workmen's compensation acts do not apply to land owned by the Government is patently untenable. See 40 U.S.C. §290;[10] Travelers Insurance Co. v. Cardillo, 141 F.2d 362, 363(D.C.Cir.).

Had a private corporation, instead of the Government, as part of its normal business contracted with another for the operation of Rocky Flats, the corporation would be immune from suit by plaintiff as a statutory employer. See e.g., Posey, 583 P.2d at 304-305; O'Quinn v. Walt Disney Products, Inc., 177 Colo. 190, 493 P.2d 344(construing C.R.S. §81-9-1 (1963), the predecessor Workmen's Compensation Act); Herriot v. Stevenson, 172 Colo. 379, 473 P.2d 720(to the same effect, but finding intermediate employer uninsured). Plaintiff has not explained why the United States should be denied the statutory employer immunity available to a private party. No reason for such a result is apparent. Despite whatever characterization plaintiff appends to the United States-Rockwell relationship, we are persuaded that the statutory employer immunity bars his suit under Colorado law and that the district court properly

dismissed his suit against the Government. See Roelofs v. United States, 501 F.2d 87, 93(5th Cir.), cert. denied, 423 U.S. 830(applying Louisiana workmen's compensation law to an Army munitions plant operated by Speery Rand); Oveda v. United States, 508 F.Supp. 255 (E.D.Tex.)(collecting other federal cases applying to the United States the statutory employer defense); Scanlon v. United States, Civil No. 78-F-509(D.Colo., June 21, 1979).[11]

V

There remain several miscellaneous arguments of plaintiff which we will briefly treat.

Plaintiff argues that agents of Rockwell and Travelers improperly influenced him to elect the workmen's compensation exclusive remedy in order to reduce their liability. (See VII R. 84-87). The district court stated that there simply was no election to be made. The workmen's compensation claim was received by the Department of Labor and Employment on October 26, 1976,(I R.36), five months after the accident. (VII R.53). There are no circumstances indicating that defendants' opportunings overcame the will

of plaintiff and his counsel. However, the district court's holding on this point is grounded on the idea that there was no prejudice to plaintiff when he had no other remedy aside from workmen's compensation benefits. This conclusion is sound. See Varsity Amusement Co. v. Butters, supra, at 394 P.2d at 305. No reasoning based upon plaintiff's "election" appears to have entered into the court's decision to dismiss the action against the Government or to grant the summary judgment for Rockwell and Nuss. (VI R. 2-13).

Plaintiff also contends that the district court's orders are defective for failing to state the facts on which it relied or the reasoning it used. Plaintiff urges that the "provisions of Rule 56, Federal Rules of Civil Procedure, cannot be read separately from Rule 52 which requires specificity in a trial court's findings of fact and conclusions of law." (Appellant's Opening Brief, page 7). However Rule 52(a) expressly states, in pertinent part, that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule

41(b)." See also Williams v. Eaton, 443 F.2d 422, 433(10th Cir.). Because the court's orders were not entered pursuant to Rule 52, which requires findings after a non-jury trial, or pursuant to Rule 41(b) requiring similar findings when a plaintiff's case is dismissed after presentation of his evidence, the language quoted above from Rule 52 would appear to dispose of plaintiff's contention. Further, plaintiff was advised of the reasoning of the court by the judge's orders and comments on record. (V R. 514-16);VI R. 2-13).[12]

Lastly, plaintiff maintains that the failure of defendants to file a report with local police shows that defendants did not treat Colorado law as applying to the plant and that this further demonstrates that the provisions of the Colorado Workmen's Compensation Act are also inapplicable to the plant on federal land. Plaintiff notes that C.R.S. 1973 §§42-4-1401, 1403 & 1406 require police reports of all accidents within the state resulting in injury. These sections are not a part of the Workmen's Compensation Act which contains its own reporting requirements. C.R.S. 1973

§8-45-101. Defendants complied with the reporting requirements of that Act. (IV R. 308). Plaintiff's argument on this point is without merit.

VI

We are convinced that no error is demonstrated in the rulings made by the district court on this record. Accordingly, the judgments entered are

AFFIRMED.

FOOTNOTES

[1] In Aldinger the Court quoted an observation from Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894(4th Cir.), that the arguments for federal pendent jurisdiction are not the only consideration to be taken into account; that especially is so where the efficiency the plaintiff seeks is available in the state courts. 427 U.S. at 15. In the instant case, of course, such efficiency is unavailable because the FTCA vests exclusive jurisidction of the claim against the government in the federal courts.

[2] While there is no express statement in our record that the district court concluded it should exercise its discretion to entertain the claim against Nuss, that determination is implicit in the disposition of the claim against him on the merits since the complaint alleged only pendent jurisdiction as to Nuss. The amended complaint alleged that "[j]urisdiction over defendant NUSS is pendent to the jurisdiction over the other defendants." (I R.1). The Government's answer stated that such conclusions of law need not be admitted or denied. (I R. 6). The answer of Rockwell and Nuss stated that they were without sufficient knowledge and information to form a belief as to this allegation and therefore denied it. (I R. 9).

[3] Plaintiff's deposition testimony indicates that he arrived at Lot No. 50 at 7:08 a.m. (VII R.15). A Rockwell investigation found that the accident occurred at 7:06 a.m.(III R. 533).

[4] Though both counsel for the Government and the court discussed the motion as one brought under Rule 12(b)(6), Fed.R.Civ.P., we note that matters outside of the pleadings were presented and relied upon in disposition of the motion. Therefore, we treat the motion as a "speaking motion," or motion for summary judgment, as provided in Rule 12(b), Fed.R.Civ.P.

[5] C.R.S.973 §8-52-102 states:

(1) The right to compensation provided for in [the Act] in lieu of any other liability to any person for any personal injury or death resulting therefore, shall obtain in all cases where the following conditions occur:

(a) Where, at the time of the injury, both employer and employee are subject to the provisions of said article and where the employer has complied with the provisions thereof regarding insurance;

(b) Where, at the time of the injury, the employee is performing service arising out of and in the course of his employment;

(c) Where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of his employment and is not intentionally self-inflicted. (Emphasis added).

[6] C.R.S. §8-42-102 provides:

"An employer who has complied with the provisions of Articles 40 to 54 of this title, including the provisions relating to insurance, shall not be subject to the provisions of Section 8-42-101; nor shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability for the death or personal injury to any employee, except as provided in said article; and all causes of action at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any persons are abolished except as provided in said articles." (Empahsis added).

The Act has been construed to bar suits by one employee against a co-employee for injuries sustained while both were acting within the course of their employment, Sieck v. Trueblood, 29 Colo. App.

432, 485 P.2d 134,135; C.R.S. 1973 §8-42-102, just as a claim against an employer is barred. Varsity Amusement Co. v. Butters, 155 Colo. 330, 394 P.2d 603, 605. From the record it is clear that Nuss was acting within the course and scope of his employment by Rockwell and we reach the same conclusion as to plaintiff for reasons that follow.

[7] See also Divelbiss v. Industrial Comm., 140 Colo. 452, 344 P.2d 1084, 1086, quoting with approval 1 Larson's Workmen's Compensation Law, §21.60, p. 313: "The course of employment, for employees having a fixed time and place of work, embraces a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts such as washing or changing his clothes."

[8] In Appellant's Opening Brief, p. 10, plaintiff states that his arrival time was not "a result of any employer directive or request." At plaintiff's deposition the following colloquy took place(VII R. 71-72):

> Q. And was it Mr. Johnson's expection that you would be there ready to work at 7:30 with coveralls on?
> A.[Plaintiff] Yes, he was starting that.
> Q. So you were expected then to be ready at 7:30 with your coveralls on to start work on your shift, is that correct?
> A. In your area--or 7:30, you mean?
> Q. Yes.
> A. Right.
> Q. So this was one of the reasons for coming somewhat earlier, was to be able to get through the security checkpoint, get to the locker, change clothes and be ready to work at your particular area in 76 at 7:30 a.m.? Is that correct?
> A. Yes, and to kind of have a cup of coffee before we start.

The disparity between these statements and plaintiff's brief on appeal does not appear to create a contested

factual issue preventing summary judgment. See e.g., H.B. Zachry Co. v. O'Brien, 378 F.2d 423(10th Cir.). In light of the "totality of circumstances" test used by Colorado courts, we feel the conclusion drawn by the district court from the facts as detailed is not in error.

[9] Section 8-48-101(2) provides:

(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind, including actions under sectioon 8-52-108, against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof.

[10] The relevant provisions of 40 U.S.C. §290 read as follows:

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if the said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be. (Emphasis added).

[11] We are mindful that we denied a statutory employer defense to the Government in Richardson v. United States, 577 F.2d 133(10th Cir.). There we applied Florida law and determined that the Government was not entitled to the statutory employer defense because it was not a "contractor," since it had no contractual relationship with the subcontractor which employed the plaintiff. Id. at 135. We distinguished Roelofs by noting that it was assumed in that case that the United States would have been immune from a third party tortfeasor action, had it been a private employer. Id. at 137. However, in Richardson we concluded that, if the United States had been a private employer, it would not have been immune. Id. In light of these substantial difference, Richardson does not conflict with our conclusion here. See id. at pp.135-37.

[12] We are mindful of our decisions in Hill v. Morton, 525 F.2d 327(10th Cir.); Heber Valley Milk Co. v. Butz, 503 F.2d 96(10th Cir.); and Nichol v. United States, 501 F.2d 1389(10th Cir.). We feel that their requirements of findings as a statement of reasons for ruling in particular types of cases are not at variance with what we hold here, namely that the district court's orders, taken together with the court's statements from the bench, gave the grounds for the ruling adequately.

ORDER DENYING PETITION FOR REHEARING

MAY TERM-May 23, 1984.

Before the Honorable Oliver Seth, Honorable William J. Holloway and Honorable Monroe G. McKay, Circuit Judges

LEROY STEWART,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 80-1329
	)	
UNITED STATES OF AMERICA, GARY D. NUSS, ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation,	)	
	)	
Defendants-Appellees.	)	

This matter comes on for consideration of the petition for rehearing filed by appellant in the above captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk.

DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

LEROY STEWART,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	78-K-1061
v.	)	
	)	
UNITED STATES OF AMERICA, GARY D. NUSS, and ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation,	)	
	)	
Defendants.	)	

KANE, District Judge

The above-entitled action is currently before the court on defendant's motions for summary judgment. As set forth below, the motions are granted in part and denied in part.

The case law in Colorado makes it clear that plaintiff's injury was compensable under the Workmen's Compensation Act. See State Compensation Insurance Fund v. Walter, 143 Colo. 549(1960)(en banc); Woodruff World Travel, Inc. v. Industrial Commission, 38 Colo.App.92, 554 P.2d 705(1976), cert. denied, __ Colo. __(1974); Deterts v. Times Publishing Company, 38 Colo. App. 48, 552 P.2d 1033(1976),

cert.denied, [Colo. (1976); Campbell v. Gates Rubber Company, Colo.App., 526 P.2d 679(1974); Sieck v. Trueblood, 29 Colo.App. 432, 485 P.2d 134(1971); and Kitchens v. Department of Labor and Employment, 29 Colo.App. 374, 486 P.2d 474(1971). Accordingly, plaintiff's exclusive remedy against defendant Rockwell International is pursuant to workmen's compensation.

Plaintiff has complained that defendant Rockwell International took certain courses of action to preclude plaintiff from an election of a judicial remedy and to reduce its own liability. In the situation here, where an employer has complied with the Workmen's Compensation Act, there is simply no election, since, as stated above, the workmen's compensation remedy is exclusive. See C.R.S., §8-42-102(1973); State Compensation Fund v. Foulds, 167 Colo. 123, 128-29(1968); Varsity Company v. Butters, 155 Colo. 330, 335-37(1964).

There is no dispute that defendant Gary D. Nuss was acting in the scope of his employment at the time of the accident. While the workmen's compensation

preserves judicial remedies against third parties not in the same employ as the complaining employee, see C.R.S., §8-52-108(1973), the statute is a bar to a suit by an employee against a co-employee for injuries sustained when both were acting within the scope and course of their employment. See Sieck v. Trueblood, supra, 485 P.2d at 135; Nelson v. Harding, 29 Colo. App. 76, 480 P.2d 851(1970), cert. denied, __Colo.__, (1971).

The claim against the United States is more problematic. The Federal Tort Claims Act is both a limited waiver of sovereign immunity and a grant of jurisdiction. See 28 U.S.C. §1346 and 2671. The latter section makes it clear that the United States is not vicariously liable for the torts of its independent contractors. See United States v. Orleans, 425 U.S. 807(1976); Logue v. United States, 412 U.S. 521(1973). The issue becomes whether this court has jurisdiction over the claims asserted against the United States. Whether Rockwell International is an independent contractor, or the Rocky Flats facility is a federal establishment or instrumentality are questions of

material fact that cannot be resolved here by way of summary judgment. I note that Judge Matsch has recently described the operations at Rocky Flats in United States v. State of Colorado, 460 F.Supp. 1184 (D.Colo. 1978).

While jurisdiction cannot be assumed, I think it is fair in the present situation to point out that even should this court have jurisdiction, the applicable law would give the United States the same immunity under the workmen's compensation that it gives to other "statutory employers." See C.R.S. §8-48-101(1973); Edwards v. Price, 191 Colo. 46(1976); Scanlon v. United States, Civil Action No. 78-F-509 (D.Colo. June 21, 1979). See generally Richardson v. United States, 577 F.2d 133(10th Cir., 1978); Roelofs v. United States, 501 F.2d 87(5th Cir. 1974). While I express no view on the jurisdictional question itself, the parties' decision on whether to pursue that question may be better informed in light of the above. Accordingly,

IT IS ORDERED that defendants' motions for summary judgment as to defendants Rockwell Interna-

tional and Gary D. Nuss be and hereby are granted, each party to bear his or its own costs.

IT IS FURTHER ORDERED that defendants' motion for summary judgment as to defendant United States be and hereby is denied.

DATED at Denver, Colorado this 3d day of March, 1980.

JOHN L. KANE, JR.
U.S.District Judge

STATUTES:

40 U.S.C. 290

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliance with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: *Provided, however*, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further*, That nothing in this section shall be construed to modify or amend the United States Employees' Compensation Act, as amended

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CLERK

No. 84-287

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEROY STEWART, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-287

LEROY STEWART, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that his claim against the United States under the Federal Tort Claims Act was barred by provisions of the Colorado Workmen's Compensation Act.

1. This suit arises out of a traffic accident in the parking lot of the Rocky Flats nuclear weapons facility in Colorado. This facility is owned by the United States and operated by respondent Rockwell International Corporation (Rockwell). As petitioner was leaving his parked car on the way to work, he was injured by a government vehicle driven by respondent Gary Nuss, who was employed in the Rockwell Plant Protection Department. Pet. App. 34-36.

Petitioner filed suit in the United States District Court for the District of Colorado against the United States, Rockwell, and Nuss, alleging that the accident resulted

from their negligence. The district court granted summary judgment for Nuss and Rockwell, ruling that petitioner's injury arose "out of and in the course of his employment" within the meaning of the Colorado Workmen's Compensation Act (the Act), Colo. Rev. Stat. § 8-52-102(1)(c) (Supp. 1983), and that the Act constituted petitioner's exclusive remedy against his employer or a co-employee. Pet. App. 63-67. The government then moved that the claim against it be dismissed as well. The government argued that it was immune under the Act by virtue of its contract with Rockwell. Under that contract, Rockwell assumed the responsibility for managing, staffing, maintaining, and operating the plant (Pet. App. 37). The district court granted this motion and dismissed the claim (*id.* at 63-67).

The court of appeals affirmed (Pet. App. 26-61). The court agreed with the district court's determination that petitioner's accident arose in the course of his employment (*id.* at 40-46). Stating that this issue turned on whether petitioner's presence in the parking lot had been solely for his own benefit or for the mutual benefit of petitioner and his employer (*Brogger* v. *Kezer*, 626 P.2d 700 (Colo. App. 1980)), the court noted petitioner's deposition testimony that his supervisor expected him to be dressed and ready for work at 7:30 a.m., approximately 20 minutes after the time of his accident in the parking lot (Pet. App. 44-45). The court of appeals also observed (*ibid.*) that in considering a similar factual situation involving a parking lot accident prior to work, the Colorado Court of Appeals had held that the injury occurred within the scope of employment even though the benefit to the employer was slight. *Sieck* v. *Trueblood*, 29 Colo. App. 432, 485 P.2d 134 (1971).

The court of appeals then held (Pet. App. 46-53) that the claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, was barred by the Colorado Workmen's Compensation Act.

The court noted (Pet. App. 48) that the FTCA waives sovereign immunity for tort liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). See also 28 U.S.C. 2674. The court observed that one who contracts out work is deemed an employer under the Colorado Workmen's Compensation Act (Colo. Rev. Stat. § 8-48-101(1) (Supp. 1983)), that he is cloaked with a derivative immunity when the party to whom he contracts out work secures workers' compensation insurance (Colo. Rev. Stat. § 8-48-101(2)), and that alternatively, he may be liable in damages if the party to whom he contracts out work fails to procure such insurance (Pet. App. 48).[1]

Treating the dismissal of the claim against the government as the granting of summary judgment (Pet. App. 57 n.4), the court of appeals rejected "the argument that genuine issues of fact barred the dismissal as to the Government" (*id.* at 47). The court held (*id.* at 47-48) that

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[1]Section 8-48-101(1) provides in pertinent part:

> Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer. * * *

Section 8-48-101(2) provides:

> If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work, insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind * * * against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof, or against its employees, servants, or agents.

"on the undisputed facts Colorado law, made applicable under the FTCA, afforded the Government immunity from this action as a 'statutory employer' since Rockwell, as required by its contract to perform work for the Government, obtained workmen's compensation insurance which covered [petitioner's] injury." The court rejected (Pet. App. 48-51) the contention that a trial was required to determine the government's precise role in running the plant since the undisputed facts placed the relationship within the scope of Section 8-48-101(1). The court also rejected the argument that the United States had not elected coverage under the Act, noting that the Act does not require such an election and that Rockwell obtained insurance as required by its contract with the government (Pet. App. 51). Finally, the court ruled (*id.* at 51-52) that, contrary to petitioner's contention, Congress had made clear that state workers' compensation statutes may apply on land owned by the federal government. 40 U.S.C. 290.

2. Petitioner's claim plainly does not warrant review by this Court. The decision below does not conflict with any decision of this Court or any other court of appeals and does not present any important issue of federal law. Moreover, the court of appeals' decision is clearly correct.

Petitioner contends (Pet. 11-16) that summary judgment should not have been granted and that the question of whether the accident occurred during the course of employment should have been set for trial. However, petitioner does not dispute the facts upon which the court of appeals concluded that his use of the parking lot was for the mutual benefit of employer and employee; he does not indicate what new relevant facts might be adduced at a trial; nor does he explain how the court of appeals erred in its interpretation of the relevant Colorado case law. Instead, petitioner merely cites propositions recognized and discussed by the court of appeals en route to its conclusion. The lower

courts' resolution of this fact-bound issue does not warrant further review.

Petitioner also contends (Pet. 16-24) that the lower courts erred in holding that the Colorado Workmen's Compensation Act applies to the United States in the situation here. Petitioner appears to argue (Pet. 17-19, 22-24) that there were material issues of fact regarding the precise nature of the relationship between the government, on the one hand, and Rockwell and its employees, on the other. However, as the court of appeals declared, "*whatever* characterization [petitioner] appends to the United States-Rockwell relationship, we are persuaded that the statutory employer immunity bars his suit under Colorado law" (Pet. App. 52) (emphasis added). Colorado case law leaves no doubt that this ruling is correct. See *Faith Realty & Development Co.* v. *Industrial Commission*, 170 Colo. 215, 460 P.2d 228, 230 (1969) ("The [workmen's compensation] statute is intended to cover every business conducted by one through the activities of another under any kind of a contract.").

Finally, petitioner argues (Pet. 19-20) that the Colorado Workmen's Compensation Act does not apply on federal property, especially since no Colorado statute provides for such application. However, 40 U.S.C. 290 unequivocally provides that the states are free to apply their workers' compensation law on federal property.[2] Moreover, it has

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[2]40 U.S.C. 290 provides in pertinent part:

> Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America * * *.

Petitioner cites two cases (Pet. App. 18) that he suggests create "confusion" concerning the meaning of this statute. Petitioner does not

long been recognized that a state legislature need not take any special action in order to take advantage of this statute. *Wallach* v. *Lieberman*, 366 F.2d 254, 258 (2d Cir. 1966); *Capetola* v. *Barclay White Co.*, 139 F.2d 556, 559 (3d Cir. 1943), cert. denied, 321 U.S. 799 (1944); *Prescott* v. *United States*, 523 F. Supp. 918, 930 (D. Nev. 1981), aff'd, 731 F.2d 1388 (9th Cir. 1984). Since the Colorado statute applies to the facts of this case, the circumstance that the accident occurred on federal property is of no consequence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1984

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explain what "confusion" he finds in these cases. In any event, it is clear that neither case supports petitioner's argument that a state workers' compensation statute may not apply on federally owned property. In *Roelofs* v. *United States*, 501 F.2d 87 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975), the court noted that 40 U.S.C. 290 did not impose an obligation on the government to obtain Louisiana compensation insurance but ruled that the government was nevertheless immune as a "statutory employer" under Louisiana law. In *Peak* v. *Small Business Administration*, 660 F.2d 375 (8th Cir. 1981), the court held that an employee's claim against the Small Business Administration for a workers' compensation award as "statutory employer" could not be brought under the "sue and be sued" section of the Small Business Act, 15 U.S.C. 634(b)(1), but instead fell under the FTCA.

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No. 84-287

In The

Supreme Court of the United States

October Term, 1984

LEROY STEWART,

Petitioner,

vs.

UNITED STATES OF AMERICA, GARY NUSS and ROCKWELL INTERNATIONAL CORPORATION,

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Workmen's Compensation Act of Colorado (hereinafter the Act) apply to employees of Rockwell International Corporation (hereinafter Rockwell) at the Rocky Flats Plant?

II. If the Act is so applicable, was summary judgment in favor of Respondents, Rockwell and Nuss, and against Petitioner Stewart proper?

III. If the Act is so applicable, does the United States qualify as a statutory employer under its provisions, and is it thereby entitled to immunity from suit under the Federal Tort Claims Act?

IV. Were Petitioner Stewart and Respondent Nuss in fact employed by the same employer, and is the Petitioner thereby precluded from bringing suit against a co-employee under the Act?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado, *Stewart v. United States,* Civil No. 78-K-1061 (D.Colo. March 3, 1980), is set forth in the Petition For Writ Of Certiorari at page 63. The opinion of the United States Court of Appeals for the Tenth Circuit, *Stewart v. United States,* 716 F.2d 755 (10th Cir. 1982), is similarly set forth at page 26. The Order Denying Petition for Rehearing, *Stewart v. United States,* No. 80-1329 (10th Cir., May 23, 1984), is set forth at page 62 of the Petition.

—o—

JURISDICTION

The Respondents do not contest the jurisdiction of this Court pursuant to 28 U.S.C. Section 2101(c).

—o—

STATEMENT OF THE CASE

The Rocky Flats Plant, a sixty five hundred (6,500) acre tract located near Golden, Colorado, is the scene of the injury which is the subject of this litigation. It is owned in fee simple by the United States Government and is operated solely for the purpose of manufacturing nuclear weapons components. *Stewart v. United States,* 716 F.2d at 759; (Petition p. 36), pursuant to the statutory authority of the Atomic Energy Act of 1954, as amended (hereinafter the A. E. Act). 42 U.S.C. Section 2121 (1958). The authority relative to the production of atomic weapons was originally conferred upon the Atomic Energy Commission (hereinafter AEC) in 1946. However, in 1974, the AEC was abolished and, from 1974 to 1977, the Energy Research and Development Administration (hereinafter ERDA) was responsible for the administration of the A. E. Act. 42 U.S.C. Section 5814

(1974). ERDA was, therefore, the existing responsible agency at the time of the accident on May 20, 1976. Since October 1, 1977, this authority has been vested in the Secretary of Energy pursuant to the Department of Energy Organization Act, Section 301(a). 42 U.S.C. Section 7151. (Affidavit of Herman E. Roser, Manager of the Albuquerque Operations Office of the United States Department of Energy [DOE], Appendix A).

In June, 1975, pursuant to the authority of the A. E. Act, the United States executed a contract with the Rockwell International Corporation (hereinafter Rockwell) for the operation of the Rocky Flats Plant. Under the cost-plus-fixed-fee contract, Rockwell was charged with the responsibility of managing, staffing, maintaining and operating the Rocky Flats Plant on a day-to-day basis. The contract also provided that persons employed by Rockwell would not be deemed employees of the Government. In addition, it required Rockwell to obtain, at Government expense, workmen's compensation coverage for its employees at the Rocky Flats Plant. *Stewart*, 716 F.2d at 759-760; (Petition, p. 37). Such coverage was obtained and in force on the date of the accident. (Affidavit of James A. Stout, Counsel for ERDA at the Rocky Flats Area Office in May, 1976, Appendix B).

At the Rocky Flats Plant, a perimeter fence encloses a secured area where work buildings, parking areas and related structures are located. Parking Lot #50, where Petitioner LeRoy Stewart was accustomed to parking (Deposition of Plaintiff, LeRoy Stewart, pp. 25-26, Appendix C), is located within this area. (Affidavit of James R. Nicks, Assistant Area Manager for Administration, DOE, Rocky Flats Area Office, Appendix D).

At the time of the accident which is the subject of this litigation, the Petitioner was employed by Rockwell as a

probe and cable fabricator. *Stewart,* 716 F.2d at 759; (Petition, p. 34). On the morning of May 20, 1976, Stewart and his two car pool members drove to the east gate of the enclosed plant grounds, showed their employee badges to the guard at the guard house, and proceeded to Parking Lot #50 where Stewart parked his car. *Id.* at 759; (Petition, p. 34); (Deposition of Plaintiff, LeRoy Stewart, p. 11, Appendix C). Petitioner's only reason for being in the parking lot was to go to work at the Plant that morning. (Deposition of Plaintiff, LeRoy Stewart, p. 73, Appendix C).

Stewart normally worked the 7:30 a.m. shift. His supervisor at the time of the accident, Rockwell employee Chuck Johnson, expected Stewart and the other employees to be ready to start work at 7:30 a.m. with their overalls and work boots on. *Stewart,* 716 F.2d at 759, note 8 at 762; (Petition, pp. 34, 44, 59-60). Arriving at the Plant at approximately 7:08 a.m. was Stewart's usual procedure in order to be able to start work at 7:30 a.m. (Deposition of Plaintiff, LeRoy Stewart, pp. 15-16, Appendix C). He would normally enter Building 750 where a guard would again examine his employee badge, proceed to Building 778 to change clothes in the locker room, and then enter Building 776 where he performed his work. (Deposition of Plaintiff, LeRoy Stewart, pp. 27-28, Appendix C).

At approximately 7:08 a.m., as Petitioner stood beside his parked car, he was struck and injured by a vehicle operated by a Rockwell employee Gary D. Nuss. Petitioner was pinned between the two vehicles, and suffered severe injury to both legs. In 1979, his right leg was amputated below the knee, a procedure necessitated by osteomyelitis. *Stewart,* 716 F.2d at 759; (Petition, p. 35).

Nuss, a Rockwell security guard under the supervision and control of the Rockwell Plant Protection Department

(Affidavit of S.G. Thomas, Plant Protection Manager, Rockwell International Corporation, Rocky Flats Plant, Appendix E), was making his final security check for the midnight shift as he drove through Parking Lot #50. It is undisputed that he was acting within the scope and course of his employment at the time of the accident. *Stewart,* 716 F.2d at 759; (Petition, pp. 35-36).

After the accident, Stewart received payments under workmen's compensation from The Travelers Insurance Company, the insuror of Rockwell at the Rocky Flats Plant. *Id.* at 759; (Petition, p. 36). In October, 1976, Stewart filed an Accidental Injury Claim For Compensation with the Department of Labor and Employment and, on November 8, 1978, after commencing his action in the federal court, Petitioner signed an Election of Remedies, not only listing Rockwell International as the employer, but also stating that he elected to take compensation as provided in C.R.S. 1963, Chapter 81, as amended. (Deposition of Plaintiff, LeRoy Stewart, pp. 53, 74, Appendix C). Petitioner also applied for and received Social Security Disability Benefits. (Deposition of Plaintiff, LeRoy Stewart, p. 97, Appendix C).

At all times pertinent to the workmen's compensation procedures in this case, Petitioner has been represented by attorneys or other representatives of his selection.

This action was commenced by the filing on October 12, 1978, of a Complaint against the United States invoking the jurisdiction of the United States District Court based upon the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) and Section 2671 *et seq.* In February, 1979, Plaintiff amended his Complaint to include Gary D. Nuss and Rockwell International Corporation as party Defendants, alleging negligence on the part of all three Defendants.

Respondents, Rockwell and Nuss, moved for summary judgment on the basis that the action was barred by the exclusive remedy provision of the Workmen's Compensation Act of Colorado. *Stewart,* 716 F.2d at 760; (Petition, p. 38). The United States also moved for summary judgment on the basis that it was entitled to immunity as a statutory employer under the relevant provisions of that Act. *Id.* at 760; (Petition, p. 38). The District Court granted summary judgment in favor of Respondents, Nuss and Rockwell, on March 3, 1980 and subsequently dismissed the suit against the United States. *Id.* at 760; (Petition, pp. 38, 66-67). On appeal, the Tenth Circuit Court of Appeals affirmed, treating the Motion To Dismiss under Rule 12(b) (6), Fed. R. Civ. P., as one for summary judgment. *Stewart,* 716 F.2d, note 4 at 760; 766 (Petition, pp. 57, 56). The Petition For Rehearing was denied on May 23, 1984. (Petition, p. 62). On August 20, 1984, the Petition For Certiorari was docketed with the Clerk of the Supreme Court of the United States.

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REASONS FOR DENYING THE WRIT

I. The Workmen's Compensation Action of Colorado does apply to employees of Rockwell International Corporation at the Rocky Flats Plant, owned in fee simple by the United States government.

As part of his argument that the Workmen's Compensation Act of Colorado should not apply to Rockwell employees, petitioner assumes that the Rocky Flats Plant site is an area under exclusive federal jurisdiction. (Petition, p. 19). In fact, this is not the case. In order to secure exclusive or concurrent jurisdiction of property within a state's political boundaries, the federal government must either comply with constitutional requirements relating to

Congressional power to exercise exclusive jurisdiction over purchased property by obtaining the consent of the state legislature, or it must obtain a cession of legislative authority from the state in which the land is located. *United States v. Gliatta,* 580 F.2d 156, 158 (5th Cir. 1978). In addition, since 1940, Congress has required that the United States give its affirmative assent to the transfer of exclusive or concurrent jurisdiction before such jurisdiction becomes effective. *Id.* at 158. Where the United States government desires to acquire land within a state by purchase or condemnation, it does not need the consent of the state; absent such consent, however, the United States takes title as an ordinary proprietor and does not obtain exclusive or concurrent jurisdiction. *Id.* at 158.

At the Rocky Flats Plant, the United States government enjoys the status of a proprietor. The land on which the injury occurred was acquired by condemnation in 1951, and there is no evidence that any consent or cession of jurisdiction was ever acquired from or granted by the State of Colorado. In addition, there is nothing in the record to indicate the federal government has ever given its consent to accept a transfer of exclusive or concurrent jurisdiction at the Rocky Flats Plant. Absent the state's consent, or a cession of jurisdiction, the state's jurisdiction over the land is not limited, except that the state may not exercise jurisdiction directly over the United States or its instrumentalities. *United States v. Lewisburg Area School District,* 539 F.2d 301, 307 (3rd Cir. 1976). Thus, the jurisdiction of the State of Colorado would extend to the employees of a private contractor, here Rockwell, engaged in work at the Rocky Flats site, and the Workmen's Compensation Act of Colorado would be effective as to those employees.

However, even if the site were under the exclusive jurisdiction of the federal government, the Workmen's Compensation Act of Colorado would still apply to the employees of Rockwell at the Rocky Flats Plant pursuant to 40 U.S.C. Section 290. The text of 40 U.S.C. Section 290 is set forth in the Petition at page 68. As noted in *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1319 (9th Cir. 1982), "[t]he language of 40 U.S.C. Section 290 unambiguously permits application of state worker's compensation laws to all United States territory within the state." Furthermore, the operation of the statute requires no affirmative act on the part of a state legislature as suggested by Petitioner. *Capetola et al. v. Barclay White Co.*, 139 F.2d 556, 559 (3d Cir. 1943), *cert. denied*, 321 U.S. 799 (1944).

The *Capetola* court also distinguished the effect of the statute from one seeking to impose federal law upon the states:

> It is, of course, patent from a reading of the Act of 1936 that Congress did not thereby adopt State Compensation Acts as federal law applicable to federal territories within the exterior boundaries of the States. But it is our opinion that the purpose and effect of the congressional Act was to *free State workmen's compensation laws from the restraint upon their enforcement* theretofore existing by reason of the exclusive federal jurisdiction of lands within the States . . . *Id.* at 559 (emphasis added).

To the same effect is *Travelers Insurance Co. v. Cardillo*, 141 F.2d 362, 363 (D.C. Cir. 1944). Thus, pursuant to 40 U.S.C. Section 290, the Colorado Workmen's Compensation Act would apply to employees of a private corporation engaged in work on lands under the exclusive jurisdiction of the United States government in Colorado.

Finally, even if the Rocky Flats Plant were under exclusive federal jurisdiction, 40 U.S.C. Section 290 would

not have been a necessary prerequisite to the enforceability of the Workmen's Compensation Act at the Rocky Flats Plant. Relevant sections of the Act were passed in substantially their current form in 1919. 1919 Colo. Sess. Laws, Chapter 210, Sections 6, 7, 8(b), 9(b), 12, 13, 15, 18, 49. (Appendix F). The United States acquired the Rocky Flats site in 1951 and operations commenced in 1952. (Affidavit of Herman E. Roser, Appendix A). It is true that, after a state has ceded land to the exclusive jurisdiction of the United States, the area lies beyond a per se application of state law. *Capetola v. Barclay White Co.,* 139 F.2d at 558. However, " . . . local laws in effect at the time of the cession of jurisdiction to the United States *continue in force in the ceded territory* as federal laws except where they are inappropriate to the changed situation or are inconsistent with federal law." *Id.* at 558 (emphasis added). Here, there were no changed circumstances or inconsistencies with federal law which would have precluded the continuing applicability of the Workmen's Compensation Act to activities upon this property had exclusive jurisdiction been transferred to the federal government.

II. Under the Workmen's Compensation Act of Colorado, the Petitioner's injury was compensable and such compensation under the Act is Petitioner's exclusive remedy. Therefore, summary judgment in favor of Respondents, Nuss and Rockwell, was proper.

The purpose of the Workmen's Compensation Act (hereinafter the Act) is to provide timely compensation to injured employees for work-related injuries, regardless of fault, *Frohlick Crane Service, Inc. v. Mack,* 182 Colo. 34, 510 P.2d 891, 893 (1973), and case law has consistently held that the Act should be liberally construed to effect its humanitarian purposes. *Deterts v. Times Publishing*

Co., 38 Colo. App. 48, 552 P.2d 1033 (1976), *cert. denied* (1976). In return, the employer who is responsible under the Workmen's Compensation Act is granted immunity from common-law claims. C.R.S. Section 8-42-102; *see also, Frohlick Crane Service, Inc.*, 510 P.2d at 893.

In this case, the Act worked exactly as intended. The United States contracted with Rockwell for the manufacture of nuclear weapons components. As a part of the operating agreement, it required Rockwell to obtain workmen's compensation insurance for Rockwell's employees, and this expense was reimbursed by the United States as an allowable operating cost. Rockwell did obtain such insurance and it was in force at the time of Stewart's injury. While represented by counsel, Stewart accepted and received compensation benefits under the Act. The payment of compensation to Petitioner was proper, and the Petitioner's acceptance of such benefits precludes any statutory or common law action against his employer or statutory employer.

A. *Petitioner's injury is compensable under the Act because, on the undisputed facts before the Court, it arose out of and in the course of his employment.*

1. Injuries incurred going to and from work are compensable where special circumstances create a causal relationship between the employee's injury and the employment. *Woodruff World Travel, Inc. v. Industrial Commission*, 38 Colo. App. 92, 554 P.2d 705, 707 (1976), *cert. denied* (1976). Furthermore, the totality of the circumstances must be examined to determine if a sufficient nexus of this type exists. *City & County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162, 1163 (1978). In *State Compensation Insurance Fund v. Walter*, 143 Colo. 556, 354 P.2d 591 (1960), the Supreme Court of Colorado observed:

> An accident arises out of and in the course of employment of a workman when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is to be performed and the resulting injury. *Id.* at 592.

As indicated by the Tenth Circuit in its opinion, the facts recited by Petitioner before that Court, *Stewart,* 716 F.2d at 761, and restated in this Petition (Petition, p. 8), are simply not persuasive that a factual issue remains as to whether compensation was proper under the Act.

The undisputed facts of this case, viewed in their totality, indicate that it clearly falls within recognized exceptions to the "going and coming" rule which permit recovery under the Act. At the time of the accident, Petitioner and his two carpool partners had passed one security check-point on the site and had entered the portion of the plant which was within a perimeter security fence. Then they traveled down a restricted access road and parked in a parking lot owned by the United States and principally used by Rockwell employees, with the knowledge and approval of Rockwell. All three employees had exited the vehicle and were preparing to walk to the building where they worked. While standing beside the vehicle, Petitioner Stewart was struck by a vehicle driven by a co-employee, Gary Nuss, who was performing a routine check of the parking lot in his capacity as a Security Guard for Rockwell. *Stewart,* 716 F.2d at 759. Although the occurrence of an injury in a parking lot is not determinative of compensability, *see generally, Matter of Welham,* 653 P.2d 760 (Colo. App. 1982), the Colorado courts have found the applicable law generally favors compensation where the lot is on the employer's premises and is used at the express or implied direction of the employer. *Id.* at 762.

After reviewing the approaches taken by the courts of other jurisdictions, the Supreme Court of Colorado has adopted the trend favoring compensability:

> Our . . . consideration of the holdings in other states reveals that the main line of American decisions is to the effect that accidents occurring in or en route to parking maintained on its premises or provided by the employer for the benefit of its employees, are compensable as arising out of and in the course of employment, even though they may occur while the employee is on his way to or from his place of employment and even though they occur on a public roadway dividing the place of employment from the parking lot. *State Compensation Insurance Fund v. Walter,* 354 P.2d at 593.

This rationale is valid even if the employer was not obliged by the contract of employment to furnish a parking lot, and the employee was not obliged to come to work in an automobile. *Id.* at 594.

These rules have permitted compensation to be affirmed in cases presenting far less compelling facts than the instant case. *See, e.g., Campbell v. Gates Rubber Co.,* 526 P.2d 679 (Colo. App. 1974) (where worker was injured after completing her shift for the day in a slip and fall accident which occurred while walking down a public sidewalk toward her car parked in a lot owned and maintained by employer for convenience of its employees, the injury was compensable under the Workmen's Compensation Act, and was her sole remedy); and *Kitchens v. Department of Labor & Employment,* 29 Colo. App. 374, 486 P.2d 474 (1971), *cert. denied* (1971) (where an employee was shot while waiting in a parking lot before working hours for a vehicle provided by the employer to transport employees to logging operations; though the injury resulted from the accidental discharge of a hunting rifle

brought by a co-employee and not required for work, it was held to arise in the course of employment *as a matter of law.*)

The positional risk approach of the *Kitchens* court was succinctly stated:

> [I]n cases involving injuries of an origin not common to a particular type of employment, if an employee's work positions him where he was when injured, *and* if it is demonstrated that his injury would not have occurred *but for that fact,* the required causal connection between the employment and the injury has been established. *Id.* at 476 (emphasis in original).

Finally, in *Woodruff World Travel, Inc.,* 554 P.2d at 707, the court extended the rule articulated in the *State Compensation Insurance Fund v. Walter* case, and found that, where a parking lot was owned by the employer's landlord, who provided free parking for the tenants' employees, and such parking constituted an obvious fringe benefit of which the employer was aware, an employee leaving work who slipped and fell on some ice while crossing the parking lot was entitled to workmen's compensation. The court ordered compensation to be paid even though the injury occurred off the employer's premises.

Considered in the light of these well developed exceptions to the "going and coming" rule, Petitioner's injuries are clearly compensable under the Act. The circumstances surrounding the injury present a strong and rational causal connection to the conditions of the employment, which placed the Petitioner in the position where he sustained his injury.

2. Secondly, Petitioner has raised objections to the award of compensation based upon the fact that Petitioner had arrived at work early (at approximately 7:08 a.m.) and would not be compensated for work until 7:30 a.m. However, it is undisputed that Petitioner arrived at work

early because his supervisor expected employees to be dressed and ready for work at 7:30 a.m. *Stewart,* 716 F.2d at 762. Not only was he conferring a benefit on the employer by his early arrival, but also his conduct was necessitated by the express instruction of the employer.

The Colorado Supreme Court has held that:

> Injuries which occur to an employee while going to or from work may be compensable when it appears that at the time of such injuries he is engaged in doing an act, or performing a duty, which he is definitely charged with doing as a part of his contract of service, or under the express or implied direction of his employer. *Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2, 5 (1967).

The court observed this rule had been applied even before or after customary working hours. *Id.* at 5; *accord, Kitchens,* 486 P.2d at 476.

The applicability of the Workmen's Compensation Act to injuries occurring on the employer's premises prior to the formal commencement of work was also confirmed in *Sieck v. Trueblood,* 29 Colo. App. 432, 485 P.2d 134 (1971). There an employee had arrived at his employer's premises approximately 15 minutes before starting time. As he was driving his own automobile across a large truck yard in order to warm up his truck motor, he was struck by a truck driven by a co-employee. Although there was no company policy requiring an early vehicle warm-up, the court held that Sieck's injuries were compensable exclusively under the Act, barring a suit against his co-employee. The court found that Sieck was acting within the course of his employment:

> "The course of employment, for employees having a fixed time and place of work, embraces a *reasonable interval before and after official working hours while the employee is on the premises engaged in prepara-*

> *tory or incidental acts.* The rule is not confined to activities that are necessary; it is sufficient if they can be said to be reasonably incidental to the work." *Id.* at 135 (emphasis added).

The court also found that Sieck's activity fell within the "dual purpose doctrine" which provides that, where an employee performs an act of mutual benefit to himself and his employer, it cannot be regarded as purely personal and wholly unrelated to his employment. Therefore, even though the advantage to the employer is slight, an injury resulting from such activity will generally be held to be compensable, as it arises out of and in the course of employment. *Id.* at 135, citing *Berry's Coffee Shop, Inc.*, 423 P.2d at 5.

The court has liberally construed the "dual purpose doctrine." *See, e.g., Deters v. Times Publishing Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976), *cert. denied* (1976). In *Deterts,* the plaintiff, an afternoon newspaper carrier, stored his bicycle in the basement of the newspaper offices to prevent vandalism and theft during school hours, a practice recognized and approved by the respondent employer. One morning when the Plaintiff was returning from the basement where he had stored his bicycle for the day, his foot was caught and injured in the freight elevator. Reversing a denial of benefits by the referee, the court found that bicycles were essential to the speedy delivery of the newspaper, and that the Times derived a benefit by ensuring the bicycles of its carrier were secure from theft. *Id.* at 1036. In addition, the Claimant was involved in an activity which he might reasonably be expected to undertake during the course of his employment, and he was at a place where he could reasonably be expected to be. *Id.* at 1036. Particularly apropos to this case is the following language of the opinion:

> If an employee goes upon the premises of the employer at a reasonable time before he is to begin his day's work and is performing acts which have a causal connection with his duties and from which the employer will benefit, and is injured while so engaged, he is entitled to recover compensation. *Id.* at 1037.

The recent cases cited by Petitioner, *Mineral County v. Industrial Commission,* 649 P.2d 728 (Colo. App. 1982), *cert. denied* (1982), *Matter of Welham,* 653 P.2d 760 (Colo. App. 1982) and *Colorado Civil Air Patrol v. Hagans,* 662 P.2d 194 (Colo. App. 1983), all involve injuries found to be compensable, and consistently illustrate a broad and liberal application of the rules discussed above.

In the *Mineral County* case, Mineral County sought review of a final order of the Industrial Commission which awarded death benefits and funeral expenses to the wife of the decedent, the only member of the Mineral County Sheriff's Department. The Industrial Commission found that special circumstances pertaining to the decedent's employment precluded application of the "going and coming" rule, which normally would have barred recovery of benefits. Although the decedent was not actively engaged in his official duties at the time of the accident and, in fact, had just completed a personal errand, the Colorado Court of Appeals found the injury compensable and affirmed the award of the Industrial Commission for the following reasons, *inter alia:* (1) the decedent was considered to be on duty twenty-four (24) hours every day, did not have a specified work shift, and could be reached at home or work by a sheriff's radio or telephone at any time of the day or night; (2) at the time of the accident, he was returning to an official car furnished by the employer; and (3) the decedent was in uniform, an apparent necessity in view of the unique circumstances of his employment. 649 P.2d at 730.

In the *Matter of Welham* case, the Petitioner sought review of the final order of the Industrial Commission which awarded death benefits and burial expenses to the Claimant, the widow of a deceased employee. In order to insure that parking would be available for customers of the store, the employer required his employees to park in private parking lots at some distance from the business location. The employee, who suffered from a total hearing loss, was struck and killed by a train as he crossed railroad tracks while walking to the store from such a parking lot. The court found that, due to directions from the employer, the hazard of travel from the parking lot became a hazard of the employment as well. The evidence presented also indicated that, on certain occasions, the decedent had attempted to park closer to the store as a result of his declining health, but was reprimanded for doing so by the employer. As a consequence, the decedent's act of parking in the municipal parking lot could not be regarded as a "purely personal" act "wholly unrelated to his employment"; rather the employer's parking policy brought the act within the "dual purpose" rule articulated in the *Berry's Coffee Shop, Inc.* and *Deterts* cases. The court held that a causal connection between the employee's death and the conditions of his employment had thereby been established, entitling the Claimant to compensation.

The *Colorado Civil Air Patrol v. Hagans* case is another in which special circumstances were found to preclude the application of the "going and coming" rule. The decedent was a volunteer member of the Colorado Civil Air Patrol and was killed while traveling in a small, privately owned aircraft to a regularly scheduled Civil Air Patrol meeting. Since, by statute, all members of the Civil Air Patrol are considered to be employees, *see* C.R.S. Section 8-41-106(1)(a)(I)(A), the decedent was subject to the

Colorado Workmen's Compensation Act. The Colorado Court of Appeals concluded that among the special circumstances which would permit compensability was the condition that an employer might agree, expressly or impliedly, that the employment relation would continue during the period of travel to and from work. Because the commander of the squadron had approved the decedent's flying to such meetings, and the sole purpose of the airplane trip was to attend the meeting, such an agreement was inferred in this case, even though the travel time and expense were not compensated by the employer. The decedent was considered to be performing a duty with which he was charged as a part of his contract for service, under the express or implied direction of his employer.

Collectively, these summarized cases cited by the Petitioner do not add any impetus to his arguments that the injury was not properly compensable, but, rather, are consistent with the notion that, under the circumstances of this case, his injury arose out of and in the course of his employment, and compensation under the Act is his sole remedy.

Finally, the Petitioner asserts that the decisions of the lower courts in this case erroneously presumed causal connection under the law. In support of this proposition, he notes two recent cases which stress that the burden of proof is on the claimant to show a direct causal relationship between the conditions of employment and the injury, citing *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968) and *Kandt v. Evans,* 645 P.2d 1300 (Colo. 1982). However, neither of these cases provides support for Petitioner's arguments. In the *Finn* case, the Claimant was found lying unconscious at his place of work and surmised that he had been struck by a forklift truck.

Although he had sustained several injuries, he did not know what had happened to cause such injuries and was unable to produce any evidence as to what had occurred. Under those circumstances, clearly distinguishable from the instant case, the Industrial Commission found that the Claimant had failed to carry his burden of proof to show the required causal relationship between the conditions of employment and the injury, and the court affirmed the Commission's denial of an award.

In the *Kandt* case, the court considered the applicability of the Workmen's Compensation Act where an employee brought an action against her employer for an intentional tort committed by a co-employee. The court held that the Workmen's Compensation Act remained the exclusive remedy available to the employee unless the action constituting the tort was found to lie outside of the co-employee's scope of employment. However, the Plaintiff had failed to allege that the Defendant was acting outside the scope of his employment. In fact, she had alleged in the complaint that all of Defendant's acts were within the scope of employment and the complaint was never amended. Therefore, the court found that it could not reach the issue on the merits. *Kandt,* 645 P.2d at 1305. The mere fact that such an employment relationship had been alleged by the Plaintiff was sufficient to allow the court to affirm dismissal of the case.

In the instant case, a similar circumstance exists. Although the Petitioner asserts that his injury is not compensable under the Act because he and Nuss were not co-employees, he has alleged in his Amended Complaint, and Respondents have admitted that, at all times material to the action, the Respondent Nuss was an employee of Rockwell. *See infra* at pp. 28-29. Thus, a tort action against Nuss and

Rockwell is clearly precluded by the exclusivity provisions of the Act if the injury is otherwise compensable under the Act. As discussed in this section, the injury is clearly compensable under the Act and interpretive case law.

B. *Because Petitioner's injuries were compensable under the Act, the exclusivity provision bars any action against the employer, Rockwell International, and Petitioner's co-employee, Gary Nuss.*

C.R.S. Section 8-42-102 provides:

> An employer who has complied with the provisions of articles 40 to 54 of this title, including the provisions relating to insurance, shall not be subject to the provisions of section 8-42-101; nor shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability for the death of or personal injury to any employee, except as provided in said articles; and all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any person are abolished except as provided in said articles.

See, e.g., Frohlick Crane Service, Inc., 510 P.2d at 893; *Campbell v. Gates Rubber Company*, 526 P.2d at 680-81; and *Olveda v. United States*, 508 F.Supp. 255, 258-59 (E. D. Tex. 1981). Petitioner simply had no option to elect to sue the employer, *Varsity Amusement Company v. Butters*, 155 Colo. 330, 394 P.2d 603, 605 (1964), or his co-employee, *Sieck v. Trueblood*, 485 P.2d at 135, under the Workmen's Compensation Act of Colorado.

Therefore, summary judgment entered in favor of Respondents, Rockwell and Nuss, based on undisputed facts before the Court, was proper. No resolution of disputed facts was necessary for the Court to reach its de-

cision. *See, e.g., Edwards v. Price,* 191 Colo. 46, 550 P.2d 856, 857-858 (1976), *appeal dismissed,* 429 U.S. 1056 (1977) (summary judgment is proper, even when factual matters are involved, if the record indicates that factual matters are not in dispute).

III. The United States, as a statutory employer of the Petitioner, is entitled to immunity from suit under the Federal Tort Claims Act pursuant to C.R.S. Section 8-48-101.

Petitioner bases his argument that the United States does not qualify for statutory immunity on his assumption that the Workmen's Compensation Act of Colorado does not apply to employees of Rockwell at the Rocky Flats Plant, (Petition, p. 18), an assumption previously discussed in this brief, *supra* at pp. 5-6. He also suggests that the United States must "elect" coverage under the statute. Not only was there no requirement under C.R.S. Section 8-48-102 that the United States make such an election, but also an amendment by the Colorado Legislature in 1976 made it clear that no election requirement was intended. The section, which prior to the amendment had read, "An employer who has elected to comply and has complied with the provisions of articles 40 to 54 of this title," was changed to read simply, "An employer who has complied with the provisions of articles 40 to 54 of this title." The amendment removing the reference to election was effective on May 20, 1976, the date of the subject accident. Consequently, no election by the United States was required.

The Federal Tort Claims Act (FTCA), 28 U.S.C. at Section 1346(b) and Section 2674, provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances. Based on this statute, and applying the Colorado

Workmen's Compensation Act, it is clear that the United States, treated as a private individual, would still retain the immunity afforded by C.R.S. Section 8-42-102. Furthermore, although Petitioner asserts that there is confusion regarding the liability of the United States under the FTCA and state workmen's compensation acts (Petition, p. 18), careful examination of the cases reveals that, though the results may vary from state to state, the difference is due to variation in state law, and not to any inconsistency in the application of federal law. The two cases cited by Petitioner, *Roelofs v. United States,* 501 F.2d 87 (5th Cir. 1974), and *Richardson v. United States,* 577 F.2d 133 (10th Cir. 1978), are perfect illustrations of this premise. In both of these cases, an injury occurred on federally owned land and the injured party brought an action under the Federal Tort Claims Act.

The facts in *Roelofs* are similar to those in the instant case. The plaintiffs were employees of the Sperry-Rand Corporation which operated the Louisiana Army Ammunition plant pursuant to a contract with the United States Army. Sperry-Rand was responsible for hiring the employees, preparing and loading the products for shipping and, in general, performing all jobs necessary to operate the plant. The cost-plus-fixed-fee contract obligated Sperry-Rand to maintain workmen's compensation for the plant employees and the premiums for the insurance were reimbursed by the government as a regular contract expense.

The *Roelofs* court found that the United States did qualify for immunity as a "statutory employer" under Louisiana law, thereby enabling it to raise a defense of nonliability under the FTCA. Furthermore, the court held that the United States should be granted such immunity, even though Louisiana could not legally impose

an obligation on the United States to procure compensation insurance or to pay compensation benefits:

> If we approach this with literalism the Government cannot prevail. This is so because Louisiana cannot impose on it a legal obligation either to procure compensation insurance or to pay compensation benefits. But this is not the history of FTCA or its generous development by the Supreme Court. That act is given a broad interpretation to effectuate the legislative aim of putting citizen and national sovereign in tort claims suits on a footing of equality as between private parties within that state. *Id.* at 92.

The court found that a proper result depended upon an examination of the purposes both of the Federal Tort Claims Act and of the Louisiana Workers' Compensation statutes:

> Sperry Rand, the contractor, maintain[ed] at the Government's expense, workmen's compensation. Not only was it done in fact, but presumably it was done in accordance with established policies which have the effect of not only relinquishing any claim to federal territorial sovereignty over lands of the Federal enclave but carrying out the substantive policies of Section 290 . . . to assure privately employed workers on Federal projects equal treatment with other industrial laborers in the state. Thus the goals of Louisiana and the United States are mutually met. The workers have the protection in fact, that they would have if, in addition to Sperry Rand's insurer, they would have the direct obligation of the Government. On the other hand, with this assured in fact, the Government, having seen to it that compensation by the contractor is afforded at the Government's expense, is, as would be a private Louisiana statutory employer, entitled to the section 6 immunity . . . *The key finally is the existence of adequate insurance required and paid for by the government.* *Id.* at 93 (emphasis added).

In *Richardson v. United States,* the Plaintiff was injured while working on a federal military installation for

a subcontractor responsible for doing sand blasting at the reservation. Both the subcontractor and the general contractor were required by the United States to maintain workmen's compensation insurance which could not be cancelled without prior notice to the United States. In Plaintiff's action against the United States brought under the Federal Tort Claims Act, the court found that the Florida law of workmen's compensation would control the action pursuant to 40 U.S.C. Section 290. However, the Court held that, *under Florida law,* the exclusivity defense of the workmen's compensation laws would be available only to one who had a *duty* to provide workmen's compensation coverage and, secondly, that the United States in this case had no such duty, because it was neither an employer nor a contractor within the meaning of the Florida statutes controlling the action. *Richardson,* 577 F.2d at 135-136. The United States was not a direct employer of the plaintiff, nor was it a contractor under the statute because it had no direct contractual relationship with plaintiff's employer, a subcontractor for the job. Rather, under the Florida statute, the United States was an "owner" who could be sued by an injured workman if the owner were alleged to be a third-party tortfeasor; thus, an action by the plaintiff under the Federal Tort Claims Act was proper. In addition, the *Richardson* court distinguished the case of *Roelofs v. United States,* noting that the Louisiana workers' compensation act was much broader than the Florida statute being considered by the Tenth Circuit.

Colorado, like Louisiana, can impose no legal obligation on the United States to procure insurance or to pay compensation benefits. Nonetheless, the United States has chosen to comply with the Act by requiring that its contractor, Rockwell, insure its liability for compensation

as required under the Act. The Act specifies no requirement that the contracting party have a duty to insure to obtain the benefit of the statutory-employer immunity. It simply says that such a party shall be construed to be an employer, and shall insure and keep insured its liability, or require its contractor to do so. Having complied with this insurance provision, without any requirement for election, the employer is granted immunity under the statute. C.R.S. Section 8-42-102.

Prior cases have consistently held that the United States qualifies as a statutory employer under C.R.S. Section 8-42-102. *Scanlon v. U.S.*, Civil No. 78-F-509 (D. Colo., June 21, 1979) as discussed in *Olveda v. United States,* 508 F.Supp. at 259. Both of these cases involved injuries to employees of the prior contractor at the Rocky Flats Plant. In both cases the United States had purchased workmen's compensation insurance through the Plaintiff's employer, the contractor, as an allowable and required expense pursuant to the terms of the operating agreement between the United States and the contractor. And in both cases, the United States was held to be immune as a statutory employer from the tort suit filed by the Plaintiff because it had complied with the requirements of state law, and could not, if it were a private individual, be held liable under like circumstances. *Id.* at 259-260. Indeed, the *Olveda* court observed that the purposes of protecting the injured employee from the financial insolvency or the uninsured status of the contractor had been fulfilled by the compliance of the United States with the Workmen's Compensation Act and concluded:

> There is no reason in law or logic to treat the United States any differently [than a private general contractor entitled to immunity] and the Colorado Courts have so held. *Id.* at 260.

Although Petitioner argues that the United States should not enjoy the immunity of a statutory employer, the Court of Appeals found that he had failed to state any reason for such a result. *Stewart,* 716 F.2d at 765. Indeed, his arguments would appear to lead to inconsistency and confusion in the application of the state workmen's compensation laws to federal enclaves. If it is the "very nature of the production of nuclear weapons which mandates that respondent United States be the employer with control over production, facilities and personnel" (Petition, p. 19), by what criteria can the United States predict which of its multifarious activities will subject it to disqualification as a statutory employer? Rather the key fact here, as suggested by the Court in *Roelofs,* is the existence of adequate insurance required and paid for by the government.

Petitioner also asserts that there is no authority which indicates that the United States would be directly liable to pay benefits if no compensation coverage were provided by the contractor. However, at least one court has held that, where the United States and its contractor at a nuclear site failed to secure compensation coverage for occupational disease, the employee could assert his "statutory-employee" status offensively and sue the United States under the Federal Tort Claims Act. *Prescott v. United States,* 523 F.Supp. 918, 929-933 (D.C. Nev. 1981), *aff'd on other grounds,* 731 F.2d 1388 (9th Cir. 1984). Resolution of this question was based on construction of the applicable Nevada workmen's compensation laws and occupational disease acts, and a finding by the court that the specialized activities of the United States, such as nuclear testing, should not preclude normal application of the Federal Tort Claims Act and applicable state laws. *Id.* at 929.

The United States does qualify as a statutory employer under the requirements imposed by the statute, C.R.S. Section 8-48-101(1) which provides that ". . . any person engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sub-lessee, contractor or sub-contractor . . . shall be construed to be an employer as defined in articles 40 to 54 of this title." Nowhere is a narrow definition of the term, "person", prescribed. To the contrary, the Colorado courts have focused on requirements that the work so contracted must be (1) a part of the normal business of the person or company contracting out such business and (2) business which the company would ordinarily accomplish with its own employees; that is, whether, absent the contractor's services, the service would of necessity be provided by the employer's own employees. *Campbell v. Black Mountain Spruce,* 677 P.2d 379 (Colo. App. 1983), *cert. denied* (1984).

The fact that the production of nuclear weapons components is a highly specialized and regulated manufacturing process does not preclude it from qualifying as a normal part of the business of the United States government. *See generally, Prescott v. United States,* 523 F. Supp. at 929. Clearly, Congress has provided for such production as a validly exercised governmental function of the United States and, absent the use of private sector contractors, employees of the United States would undoubtedly be required to perform these services. *Stacey v. United States,* 270 F.Supp. 71, 74 (E.D. La. 1967). The United States has complied with all applicable requirements of the statute and the purposes of the Workmen's Compensation Act of Colorado are best served by finding that the United States does qualify as a statutory employer.

Petitioner also argues that the United States could not enter into a "normal contract" (Petition, p. 19) due to the nature of the production involved, citing 42 U.S.C. Section 2061. The contract between Rockwell and the United States Government, in effect at the Rocky Flats Plant at the time of the injury, has been described as a government-owned, contractor-operated management contract. This type of contract, though admittedly unique, has been recognized since the time of the enactment of the Atomic Energy Act of 1946. In fact, in reporting the bill, the Senate Committee noted:

> Whenever possible, the Committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. Thus the bill permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry.
>
> S. Rep. No. 1211, 79th Cong. 2d Sess. 15 (1946).

Moreover, the utilization of the management contract concept has been recognized by the United States Supreme Court. In the case of *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952), the Court noted:

> The use of private contractors is therefore one of the ways in which [the AEC] is authorized to manage its affairs. Its activities may, in other words, be performed by it directly or through the agencies of private enterprise. 342 U.S. at 235.

The Court also observed the following:

> Congress uses the word "activities" in various sections of the Act, and seems each time to give it a broad sweep. . . . In none of these sections do we find any suggestion that 'activities' is used in a narrow sense to describe less than all of the functions of the Com-

> mission. The meaning of 'activities' as applied either to an individual or to a government agency may be broad enough to include what is done through independent contractors as well as through agents. Certainly where the pattern of conduct visualized by the Act is the use of independent contractors or agents from the field of private enterprise, the inference is strong that "activities" means all authorized methods of performing the governmental function. 342 U.S. at 235-236.

Examination of the cited statute, 42 U.S.C. Section 2061, reveals that it provides specifically for the Atomic Energy Commission (now the Department of Energy, herein DOE) "to produce or to provide for the production of special nuclear material in its own production facilities through contracts with persons obligating them to produce special nuclear material in facilities owned by the Commission." 42 U.S.C. Section 2061(b). Nothing in the statute indicates that the term, "contracts", should be given a meaning which would negate or impair the obligations of a contractual relationship between the United States and Rockwell.

IV. The United States was not the employer of Gary D. Nuss but, assuming for the sake of argument that it were, still the Petitioner would not be entitled to pursue a Federal Tort Claims Act suit.

The Petitioner has alleged (Amended Complaint, p. 3) and Respondents have admitted (Answer to Amended Complaint, p. 2) that "at all times material herein, Defendant Gary D. Nuss was an employee of Defendant Rockwell International Corporation and at the time of this occurrence was acting within the course and scope of his employment." However, Petitioner argues that the special powers conferred on Nuss pursuant to 42 U.S.C. Section 2201(k) make him an express employee and agent

for the Respondent United States. The question raised by Petitioner's argument is whether his status as an employee of Rockwell is materially altered by these powers, and whether the purposes of the Workmen's Compensation Act of Colorado would be furthered by such a finding.

The provision cited by Petitioner clearly distinguishes between "members, officers and employees" of the Atomic Energy Commission (now DOE) and "employees of its contractors engaged in the protection of property owned by the United States." 42 U.S.C. Section 2201(k). Congress clearly intended to differentiate between the two types of employees, a distinction which Petitioner would ask this Court to override on the basis of neither cited precedent nor compelling public policy. Furthermore, such a blurring of employment status would defeat one of the main purposes of the Colorado Workmen's Compensation Act, namely, to provide timely compensation benefits, by creating a need for litigation to determine the employment status of private contractors' employees on federal lands or enclaves. Such an outcome would also inhibit the effectiveness of 40 U.S.C. Section 290, the purpose of which was to ensure that the employees of private contractors working on federal reservations are qualified to receive the same compensation under a state's workmen's compensation act that they would receive if they were working on property not owned by the federal government.

Finally, if, as Petitioner argues, the "very nature of the production" (Petition, p. 19) mandates that the Respondent United States be deemed the employer, the logical conclusion would be that the United States was the direct employer not only of Gary Nuss, but also of production workers, including Leroy Stewart. In that case, Petitioner Stewart's remedies would be under the appro-

priate federal statute covering injuries to federal employees, for example, the Federal Employees' Compensation Act, 5 U.S.C. Section 8101 *et seq.*, rather than an action under the FTCA.

CONCLUSION

There was no error in the rulings made by the district court or in the affirmance of those determinations by the Tenth Circuit Court of Appeals. The Petition for a Writ of Certiorari is without merit and should be denied.

Respectfully submitted,

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Attorneys for Respondents
Gary D. Nuss
Rockwell International Corporation

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 78-K-1061

LEROY STEWART,

Plaintiff,

vs.

UNITED STATES OF AMERICA, GARY D. NUSS AND ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of New Mexico
County of Bernalillo

HERMAN E. ROSER, being first duly sworn, deposes and says:

1. Since June 16, 1975, I have been Manager of the Albuquerque Operations Office (ALO) of the United States Department of Energy (DOE), formerly the Energy Research and Development Administration (ERDA), formerly the Atomic Energy Commission (AEC). From September 1, 1972, until June 16, 1975, I served in the position of Deputy Manager, ALO. From November 1, 1968, until September 1, 1972, I was assistant Director of the Division of Military Application in the Washington Headquarters of the AEC, the predecessor agency to

ERDA and DOE. From 1961 until November 1, 1968, I held, in succession, the positions of Assistant Area Manager for Community Affairs, Deputy Manager and Area Manager in the Los Alamos Area Office of AEC, a field office under ALO. From 1948 until joining AEC in 1961, I was employed by the Zia Company, a management contractor of AEC in Los Alamos, New Mexico.

2. AEC was created as an independent agency of the United States Government by the Atomic Energy Act of 1946 (Public Law 79-585) and continued under the Atomic Energy Act of 1954 (Public Law 83-703; 42 U.S. C.A. §§ 2011-2021). Under the Energy Reorganization Act of 1974, Public Law 93-438, AEC was abolished and certain of its functions, including all of the activities of ALO, were transferred to ERDA. The effective date of the transfer of functions from AEC to ERDA was January 19, 1975. Under the Department of Energy Organization Act, Public Law 95-91, ERDA was abolished and all of its functions, including all of the activities of ALO, were transferred to DOE. The effective date of the transfer of functions from ERDA to DOE was October 1, 1977. The primary function of ALO under AEC, under ERDA, and now under DOE, has been and is the conduct of research, development, and production of nuclear weapons for national defense to the extent authorized by the President of the United States in accordance with Section 6 of the Atomic Energy Act of 1946 and Section 91 of the Atomic Energy Act of 1954 (42 U.S.C.A. § 2121).

3. In 1951, the United States acquired in fee simple approximately 2,500 acres of land located near the town of Golden in Jefferson County, Colorado, and caused to be constructed thereon certain production facilities and re-

lated buildings and structures commonly known and hereinafter referred to as the "Rocky Flats Plant." Subsequent to 1951 and continuing until the present time, the United States has caused additional production facilities and related structures to be added to the Rocky Flats Plant. At the present time, as the result of Government acquisition and construction programs, the Rocky Flats Plant consists of approximately 6,500 acres of land and approximately 95 buildings and structures, all of which are owned in fee simple by the United States.

4. In 1952, AEC entered into a "management contract" or "operating contract" with the Dow Chemical Company under which contract Dow managed and operated the Rocky Flats Plant for AEC from July 1, 1952, through June 30, 1975. Beginning July 1, 1975, and continuing until the present time, Rockwell International has operated the Rocky Flats Plant under contract with ERDA/DOE. Contract No. AT(29-2)-3533 with Rockwell International is attached hereto as Exhibit A*, a true and correct copy of the provisions of Articles I-XL, Appendix B*—"SCOPE OF WORK," and Appendix C*—"SPECIAL BANK ACCOUNT AGREEMENT."

5. The administration of the AEC/ERDA management contract with Rockwell International is the responsibility of ALO, acting through the Rocky Flats Area Office, a subordinate AEC/ERDA/DOE field office located at the Rocky Flats Plant. The contract administration activities of the Rocky Flats Area Office are carried out by approximately 60 Government employees under the

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* Exhibits A, B and C, which are voluminous, are not included here.

general supervision of the Area Manager who reports directly to the Manager, ALO.

6. Under the Contract, Rockwell International is obligated to manage, staff, and operate the Rocky Flats Plant for the purpose of developing and producing weapons components, assemblies, and ancillary equipment, as well as other work related to the mission of the Rocky Flats Plant. (Appendix B—"SCOPE OF WORK".) Article XXV of the Contract provides that the Contractor is responsible for safeguarding Restricted Data, Formerly Restricted Data, and other classified information and protecting against sabotage, espionage, loss, and theft of material in the Contractor's possession. Under the Atomic Energy Act of 1954, as amended, 42 U.S.C.A. § 2201(i), the United States has the authority to prescribe such regulations or orders as it may deem necessary to guard against the loss or diversion of special nuclear material such as is handled by Rockwell International at the Rocky Flats Plant.

7. The Government provided directly from the United States Treasury through a method known as "advanced funding," all of the funds necessary for the performance of the work at the Rocky Flats Plant under the Contract. No funds were provided or required to be provided by Rockwell International. As consideration for performance of their obligations under the Contract, the Government paid Rockwell International a fixed fee. All tangible personal property of every kind and description used in the performance of the work under the Contract was the property of the Government and no property of Rockwell International was used or required to be used in the work.

8. AEC/ERDA had the contract right to exercise varying degrees of control over the management of the production and development activities at the Rocky Flats Plant through the issuance of appropriate plans, specifications, standards, and directives in various functional areas as provided in the Contract, including but not limited to property management, safety, health, and fire protection, security guidelines, personnel policies, and records management. The day-to-day supervision of employees and management of the Rocky Flats Plant was the responsibility of Rockwell International under the Contract.

/s/ HERMAN E. ROSER

SUBSCRIBED AND SWORN TO before me this 30th day of August, 1979.

/s/ LAVERNE E. SCOTT
Notary Public

My Commission Expires
December 14, 1980

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 78-K-1061

LEROY STEWART,

Plaintiff,

vs.

UNITED STATES OF AMERICA, GARY D. NUSS AND ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of New Mexico
County of Bernalillo

JAMES A. STOUT, being first duly sworn, on oath states:

1. I am currently Assistant Chief Counsel in the Office of Chief Counsel of the Albuquerque Operations Office (ALO) of the United States Department of Energy. In 1976, at the time of the accident which is in question, I was the Counsel for the Government, at that time, the Energy Research and Development Administration (ERDA), at the Rocky Flats Area Office.

2. In my capacity as Counsel at the Rocky Flats Area Office, I was familiar with the contract between the United States and Rockwell International for the management and operation of the Rocky Flats Plant. Under the terms of the contract and applicable AEC Procurement Regulations, Rockwell International was re-

quired to carry workmen's compensation insurance for the protection of its employees. A true and correct copy of Policy Number TW-UB-133T851-9-75, the Workmen's Compensation and Employers' Liability Policy with the Travelers Insurance Companies, is attached hereto as Exhibit A*. The policies of the Atomic Energy Commission concerning the requirements applicable to cost-type management contractors, such as Rockwell International, pertaining to workmen's compensation coverage are set forth in the Atomic Energy Commission Procurement Regulations (AECPR) Subpart 9-12.53 *et seq.*, which are attached hereto as Exhibit B.*

3. Coverage under Policy Number TW-UB-133T 851-9-75 was in effect in 1976 at the time of the subject accident. Claims made for work-related accidental injuries were processed under the policy with Rockwell International by The Travelers Insurance Companies.

/s/ JAMES A. STOUT

SUBSCRIBED AND SWORN TO before me this 7th day of September, 1979.

/s/ R. A. MARQUEZ
Notary Public

My Commission Expires
9-23-81

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* Exhibits A and B are not included.

APPENDIX C

EXCERPTS OF THE DEPOSITION OF PLAINTIFF LEROY STEWART TAKEN AUGUST 3, 1979

1. Pp. 25-26 (begin Line 20)

Q. In your Answers to Interrogatories, you indicate that you and your car pool members had generally agreed to park in parking lot 50 because it was the closest parking lot to your place of work; is that correct?

A. Yes, to everybody's in the pool, car pool.

2. P. 11 (begin Line 19)

Q. And did you go on Indiana to the entrance for the east entrance to the plant?

A. Yes.

Q. Okay. And I take it, then, you entered the plant on that particular morning through the east gate?

A. Yes.

3. P. 73 (begin Line 3)

Q. Okay. On May 20th, 1976, your only reason for being in parking lot 50 was because of your employment at Rocky Flat, is that correct? You had no other purpose, in other words, for going out there on that given morning?

A. No.

Q. Is that correct?

A. Yes.

4. Pp. 15-16 (begin Line 2)

A. When I looked at my watch, it was about 7:08.

Q. 7:08?

A. Right.

Q. And then you—

A. That's the time I arrived at the parking lot.

Q. Was 7:08?

A. Yes.

Q. Is that correct?

A. Yes. I generally look at my watch before I go—

* * *

Q. Was this pretty much the time that you and members of your car pool generally arrived at the plant in the mornings when you were driving in your car pool arrangement?

A. Approximately.

Q. Okay. So this was nothing out of the ordinary on that particular day, it was about the time, give or take a few minutes, that you would have arrived in the car pool? Is that a fair statement?

A. I would say it was close.

5. Pp. 27-28 (begin Line 13)

Q. Okay. Let me ask the question this way, perhaps we can get it: If the accident had not occurred on May 20th of 1976, can you describe for us, including the identification of the buildings and the other identification of areas you would have entered, what you would have done, what your routine was that you would have followed if you hadn't been in the accident?

A. Okay. I would have gone through the 750 guard-post—

Q. That's the 750 building?

A. Right.—to the locker room of 78 to get dressed, through 78 building to 76 to my—to where the work area was.

Q. All right.

6. P. 53 (begin Line 15)

Q. All right At the time of—strike that. On October 2nd of 1976, Mr. Stewart, the records of the Department of Labor and Employment, Division of Labor, Workman's Compensation Section, indicate that you filed an Accidental Injury Claim For Compensation. Number one, did you file such a claim for compensation on or about that day?

A. May I see the claim?

Q. Yes, sir, certainly.

A. Yes.

7. Pp. 74-75 (begin Line 16)

Q. Okay. Mr. Stewart, I'm going to hand you Defendants' Deposition Exhibit I, which purports to be a document called And Election of Remedies, and it's also a two-page document in that attached to Exhibit I is a letter transmitting that Election of Remedies to a Mr. Martinez at Travelers Insurance Company, and I'd ask you to look at both those documents and then I'll ask you questions concerning them. Have you had a chance to examine those documents comprising Exhibit I, Mr. Stewart?

A. Yes.

Q. The first document entitled "Election of Remedies," that is, the first page of Exhibit I, is—has the same heading, that is, the name Leroy Stewart versus Rockwell International and the Travelers Insurance Company, as your Workman's Compensation case, does it not?

A. Yes.

Q. And the information contained in that indicates that you were electing, at the time this document was prepared, to take compensation and such other benefits, including death benefits, as provided by the Compensation Act, is that correct?

A. Yes.

Q. All right. And under the blank, "The name and address of persons who caused the accident are," colon, there is inserted the name Gary D. Nuss, is that correct?

A. Yes.

Q. And that gives his address as "Care of Rockwell International, Rocky Flats Plant," correct?

A. Yes.

Q. And the date of this document is November 8th, of 1978, is that correct?

A. Yes.

8. P. 97 (begin Line 13)

Q. Mr. Stewart, in your testimony, you indicated that you did apply for and you received Social Security disability benefits, is that correct?

A. Yes.

Q. According to the documents in the file, they determined your disability as of November, 1976, and indicated that you would be receiving on a monthly basis at that time a payment of $457.50. Do you recollect that as being the monthly amount that you received from Social Security?

A. That seems approximately right.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 78-K-1061

LEROY STEWART,

Plaintiff,

v.

UNITED STATES OF AMERICA, GARY D. NUSS, AND ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of Colorado
County of Jefferson

JAMES R. NICKS, being first duly sworn, deposes and says:

1. Since December, 1973, until the present, I have been employed as Assistant Area Manager for Administration by the U.S. Department of Energy and its predecessor agencies at the Rocky Flats Plant. From July, 1973, until December 1973, when I assumed my present position, I was Chief, Administrative Branch for the Atomic Energy Commission at Rocky Flats.

2. My duties as Assistant Area Manager for Administration require that I oversee the day-to-day administration of the contract activities of the various contractors at the Plant site. I am well acquainted with the Contract (Contract No. AC04-76DP-03533 between the

United States and the Rockwell International Corporation for the management and operation of the Rocky Flats Plant.

3. Under the provisions of the Atomic Energy Act of 1954, as amended, Section 43, (42 U.S.C. 2063) the Atomic Energy Commission was authorized to purchase any interest in facilities for the production of special nuclear materials, or in real property on which such facilities were located. In pursuance of this authority, the United States has acquired approximately 6,500 acres of land in Jefferson County, Colorado, since 1951. This area comprises the Rocky Flats Plant site.

4. I am familiar with the facts of the accident involving LeRoy Stewart on May 20, 1976, in the parking area No. 50 which is adjacent to Building 750. The parking area in question is included within the Rocky Flats Plant perimeter fence. It was part of the original land acquisition made in 1951. As such, it constitutes a part of the Rocky Flats Plant premises.

5. Rockwell employees, U.S. Government employees and other contractor employees at the plant site all utilize the parking areas provided on the plant premises. Rockwell, however, as the management contractor under its contract with the United States, is responsible for the day-to-day administration of the parking areas.

/s/ James R. Nicks

SUBSCRIBED AND SWORN TO before me this 7th day of September 1979.

/s/ Evelyn R. Peacock

My Commission expires
November 2, 1981

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 78-K-1061

LEROY STEWART,

Plaintiff,

v.

UNITED STATES OF AMERICA, GARY D. NUSS, AND ROCKWELL INTERNATIONAL CORPORATION, a Delaware Corporation,

Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of Colorado
County of Jefferson

SAMUEL G. THOMAS, being first duly sworn, deposes and says:

1. Since August 12, 1974 to the present, I have been employed as Manager of Plant Protection by the Dow Chemical Company from August, 1974 to July, 1975 and by Rockwell International Corporation since it became the operating contractor in July, 1975 at the Rocky Flats Plant, Jefferson County, Colorado.

2. From July, 1969 to August 12, 1974, I was employed as security operation supervisor by the Dow Chemical Company at the Rocky Flats Plant, Jefferson County, Colorado. Prior to July, 1969, I was manager of plant security at ACF Industries, Albuquerque, New Mexico.

3. My duties in both positions described in paragraphs 1 and 2 above have required that I be involved in the planning and coordinating of all plant security operations, including both the day-to-day activities as well as the special plant security activities such as those related to demonstrations which have occurred at the Rocky Flats Plant from time to time during my tenure there.

4. In my capacity as Manager of Plant Protection for Rockwell International, I am familiar with the Contract (Contract No. AT(29-2)-3533) between Rockwell International and the United States Government concerning the management and operations of the Rocky Flats Plant. I am aware that as a provision of the Contract Rockwell International is responsible for the employment of all personnel engaged by Rockwell to perform its work under the Contract at Rocky Flats. Persons employed by Rockwell International at the Rocky Flats Plant are employees of Rockwell International, and are not employees of the United States Government.

5. As a term of the Contract, Rockwell International is responsible for the security of the Rocky Flats Plant. While there are general ERDA/DOE guidelines for the qualifications and training of security guards, Rockwell International is responsible for the management and performance of the security operations at the Plant. A true and correct copy of the "Rockwell International Plant Protection Department, Security Inspector Training Plan" is attached hereto as Exhibit A.* All security personnel charged with protecting facilities and material at Rocky Flats are employees of Rockwell International.

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* Exhibit A, because of its voluminous nature, is not included.

They are under the day-to-day supervision and control of Rockwell supervisory personnel. Daily guard schedules and guard routes are planned and implemented by Rockwell International personnel in conformance with the general policy of Plant security.

6. Gary D. Nuss, a Rockwell Security Guard at the Rocky Flats Plant, was performing duties for the Rockwell International Plant Protection Department at the time of the accident involving LeRoy Stewart. He was under the direct supervision of Rockwell Plant Protection Department employees and was not supervised in any way by United States Government employees.

/s/ SAMUEL G. THOMAS

SUBSCRIBED AND SWORN TO before me this 7th day of September 1979.

/s/ LAVONNE P. RENTS
Notary Public

My Commission expires
1-24-81

APPENDIX F

1919 COLORADO SESSION LAWS

CHAPTER 210

WORKMEN'S COMPENSATION INDUSTRIAL COMMISSION—POWER—DUTIES

Section 6. The term "place of employment" shall mean and include every place whether indoors or outdoors or underground, and the premises, work places, works and plants appertaining thereto or used in connection therewith, where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation directly or indirectly relating to any industry, trade or business is carried on, or where any person is directly or indirectly employed by another for direct or indirect gain or profit, except as otherwise expressly provided in this act.

Section 7. The term "employment" shall mean and include any trade, occupation, job or position, or process of manufacture or any method of carrying on any such trade, occupation, job or position or process of manufacture in which any person may be engaged, except as otherwise expressly provided in this act.

Section 8. The term "employer" shall mean and include:

(b) Every person, association of persons, firm and private corporation (including any public service corporation), personal representative, assignee, trustee or receiver, who has four or more persons engaged in the same business or employment (except as otherwise expressly provided in this act), in service under any contract of hire, express or implied, and who, at or prior to the time

of the accident to the employe for which compensation is claimed under this act, has elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election in the manner provided in this act.

Section 9. The term "employe" shall mean and include:

(b) Every person in the service of any other person, association of persons, firm, private corporation, including any public service corporation, personnel representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed (who for the purpose of this act shall be considered the same, and shall have the same power of contracting with respect to their employment, as adult employes), but not including any persons who are expressly excluded from this act or whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.

ABROGATION OF DEFENSE

Section 12. In an action to recover damages for a personal injury sustained by an employe on and after the first day of August, 1915, while engaged in the line of his duty as such, or for death resulting from personal injuries so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent or servant of the employer, it shall not be a defense:

(a) That the employe, either expressly or impliedly, assumed the risk of the hazard complained of as due to the employer's negligence.

(b) That the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant.

(c) That the injury or death was caused, in whole or in part by the want of ordinary care of the injured employe where such want of care was not wilful.

Section 13. Any employer who has elected to and has complied with the provisions of this act, including the provisions relating to insurance, shall not be subject to the provisions of Section 12 of this act; nor shall such employer be subject to any other liability whatsoever for the death of or personal injury to any employe, except as in this act provided; and all courses of action, actions at law suits in equity, and proceedings whatever, and all statutory and common law rights and remedies for and on account of such death or personal injury to any such employe are hereby abolished except as in this act provided.

RIGHT TO COMPENSATION—EXCLUSIVE WHEN

Section 15. The right to the Compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, on and after August 1st, 1915, shall obtain in all cases where the following conditions occur:

(a) Where, at the time of the accident, both employer and employe are subject to the provisions of this act; and where the employer has complied with the provisions thereof regarding insurance.

(b) Where, at the time of the accident, the employe is performing service arising out of and in the course of his employment.

(c) Where the injury or death is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted.

Section 18. Any employe may become subject to the provisions of this act, and shall be deemed to have accepted, and shall be subject to the provisions thereof, if at the time of the accident upon which liability is claimed—

(a) His employer is subject to the provisions of this act and has complied with the requirements thereof, including Insurance; and if,

(b) Such employe shall not, at the time of entering into his contract of hire, expressed or implied with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act.

CONTRACTORS AND LESSEES.

Section 49. Any person, company or corporation operating or engaged in or conducting any business by leasing, or contracting out any part or all of the work thereof to any lessee, sublessee, contractor or subcontractor, shall irrespective of the number of employes engaged in such work, be construed to be and be an employer as defined in this act and shall be liable as provided in this act to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors and subcontractors and their employes, and such employer as in this section defined shall, before commencing said work insure and shall keep insured his liability as herein provided and such lessee, sublessee, contractor or subcontractor, as well as any employe of such lessee, sublessee, contractor or subcontractor, shall each and all of them be deemed employes

as defined in this act. Such employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor, and may withhold and deduct the same from the contract price or any royalties or other money due, owing or to become due said lessee, sublessee, contractor, or subcontractor; *provided, however,* that if said lessee, or sublessee, contractor or subcontractor doing any work as in this section provided shall himself be an employer as defined in this act in the doing of such work and shall before commencing said work insure and shall keep insured his liability for compensation as herein provided then and in that case such person, company or corporation operating, engaged in, or conducting said business shall not be subject to the provisions of this section.

APPENDIX G

MATERIAL STATUTORY PROVISIONS

Colorado Revised Statutes

8-42-102. *Liability of employer complying.* An employer who has complied with the provisions of articles 40 to 54 of this title, including the provisions relating to insurance, shall not be subject to the provisions of section 8-42-101; nor shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability for the death of or personal injury to any employee, except as provided in said articles; and all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any person are abolished except as provided in said articles.

8-48-101. *Lessor or contractor-out deemed employer-liability-recovery.* (1) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 54 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees' dependents. The employer, before commencing said work, shall insure and keep insured his liability as provided in said articles, and such lessee, sublessee, contractor, or subcontractor, as well as any em-

ployee thereof, shall be deemed employees as defined in said articles. The employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due said lessee, sublessee, contractor, or subcontractor.

(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work, insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind, including actions under section 8-52-108, against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof, or against its employees, servants, or agents.

United States Code

28 USC § 1346. *United States as defendant*

> (b) Subject to the provisions of chapter 171 of this title [28 USC §§ 2761 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private

person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC § 2674. *Liability of United States*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

40 USC § 290. *State workmen's compensation laws; extension to buildings and works of United States*

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States hereafter shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purpose set out in section 1 of this Act [the first paragraph of this section], the United States of America hereby vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: Provided, however, That by the passage of this Act [this section] the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: Provided further, That nothing in this Act [this section] shall be construed to modify or amend the United States Employees' Compensation Act as amended from time to time.

PRODUCTION OF SPECIAL NUCLEAR MATERIAL

42 USC § 2061. *Ownership and operation of production facilities*

(a) *Ownership of production facilities.* The Commission, as agent of and on behalf of the United States, shall be the exclusive owner of all production facilities other than facilities which (1) are useful in the conduct of research and development activities in the fields specified in section 31 [42 USC § 2051], and do not, in the opinion of the Commission, have a potential production rate adequate to enable the user of such facilities to produce within a reasonable period of time a sufficient quantity of special nuclear material to produce an atomic weapon; or (2) are licensed by the Commission pursuant to section 103 or 104 [42 USC §§ 2133, 2134].

(b) *Operation of the Commission's production facilities.* The Commission is authorized and directed to produce or to provide for the production of special nuclear material in its own production facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce special nuclear material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce special nuclear material in facilities owned by the Commission to the extent that the production of such special nuclear material may be incident to the conduct of research and development activities under such contracts. Any contract entered into under this section shall contain provisions (1) prohibiting the contractor from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission; and (2) obligating the contractor (A) to make such reports pertaining to activities under the contract to the Commission as the Commission may require, (B) to submit to inspection by employees of the Commission of all such activities, and (C) to comply with all safety and security regulations which may be prescribed by the Commission. Any contract made under the provisions of this paragraph may be made without regard to the provisions of section 3709 of the Revised Statutes, as amended [41 USC § 5], upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing by the Commission that advertising is not reasonably practicable. Partial and advance payments may be made under such contracts.

(c) *Operation of other production facilities.* Special nuclear material may be produced in the facilities which under this section are not required to be owned by the Commission.

42 USC § 2121. *Authority*

(a) *Research and development; production of atomic weapons.* The Commission is authorized to—

(1) conduct experiments and do research and development work in the military application of atomic energy; and

(2) engage in the production of atomic weapons, or atomic weapon parts, except that such activities shall be carried on only to the extent that the express consent and direction of the President of the United States has been obtained, which consent and direction shall be obtained at least once each year.

(b) *Delivery of material or weapons to Department of Defense; acquisition of weapon for military purposes.* The President from time to time may direct the Commission (1) to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense, or (2) to authorize the Department of Defense to manufacture, produce, or acquire any atomic weapon or utilization facility for military purposes: Provided, however, That such authorization shall not extend to the production of special nuclear material other than that incidental to the operation of such utilization facilities.

(c) *Cooperation with other nations.* The President may authorize the Commission or the Department of Defense, with the assistance of the other, to cooperate with another nation and, notwithstanding the provisions of section 57, 62, or 81 [42 USC § 2077, 2092, or 2111], to transfer by sale, lease, or loan to that nation, in accordance with terms and conditions of a program approved by the President—

(1) nonnuclear parts of atomic weapons provided that such nation has made substantial progress in the development of atomic weapons, and other nonnuclear parts of atomic weapons systems involving Restricted Data provided that such transfer will not contribute significantly to that na-

tion's atomic weapon design, development, or fabrication capability; for the purpose of improving that nation's state of training and operational readiness;

(2) utilization facilities for military applications; and

(3) source, byproduct, or special nuclear material for research on, development of, production of, or use in utilization facilities for military applications; and

(4) source, byproduct, or special nuclear material for research on, development of, or use in atomic weapons: Provided, however, That the transfer of such material to that nation is necessary to improve its atomic weapon design, development, or fabrication capability: And provided further, That such nation has made substantial progress in the development of atomic weapons.

whenever the President determines that the proposed cooperation and each proposed transfer arrangement for the nonnuclear parts of atomic weapons and atomic weapons systems, utilization facilities or source, byproduct, or special nuclear material will promote and will not constitute an unreasonable risk to the common defense and security, while such other nation is participating with the United States pursuant to an international arrangement by substantial and material contributions to the mutual defense and security: Provided, however, That the cooperation is undertaken pursuant to an agreement entered into in accordance with section 123 [42 USC § 2153]: And provided further, That if an agreement for cooperation arranged pursuant to this subsection provides for transfer of utilization facilities for military applications the Commission, or the Department of Defense with respect to cooperation it has been authorized to undertake, may authorize any person to transfer such utilization facilities for military applications in accordance with

the terms and conditions of this subsection and of the agreement for cooperation.

42 USC § 2201. *General provisions*

In the performance of its functions the Commission is authorized to—

(k) *Carrying of firearms,* authorize such of its members, officers, and employees as it deems necessary in the interest of the common defense and security to carry firearms while in the discharge of their official duties. The Commission may also authorize such of those employees of its contractors engaged in the protection of property owned by the United States and located at facilities owned by or contracted to the United States as it deems necessary in the interests of the common defense and security to carry firearms while in the discharge of their official duties. A person authorized to carry firearms under this subsection may, while in the performance of, and in connection with, official duties, make arrests without warrant for any offense against the United States committed in that person's presence or for any felony cognizable under the laws of the United States if that person has reasonable grounds to believe that the individual to be arrested has committed or is committing such felony. A person granted authority to make arrests by this subsection may exercise that authority only in the enforcement of (1) laws regarding the property of the United States in the custody of the Department of Energy, the Nuclear Regulatory Commission, or a contractor of the Department of Energy or Nuclear Regulatory Commission, or (2) any provision of this Act that may subject an offender to a fine, imprisonment, or both. The arrest authority conferred by this subsection is an addition to any arrest authority under other laws;

42 USC § 5814. *Abolition and transfers*

(a) *Abolition of Atomic Energy Commission.* The Atomic Energy Commission is hereby abolished. Sec-

tions 21 and 22 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2031 and 2032) are repealed.

(b) *Transfer or lapse of functions of Atomic Energy Commission.* All other functions of the Commission, the Chairman and members of the Commission, and the officers and components of the Commission are hereby transferred or allowed to lapse pursuant to the provisions of this Act.

(c) *Functions of Atomic Energy Commission transferred to Administrator.* There are hereby transferred to and vested in the Administrator all functions of the Atomic Energy Commission, the Chairman and members of the Commission, and the officers and components of the Commission, except as otherwise provided in this Act.

42 USC § 7151. *General transfers*

(a) Except as otherwise provided in this Act, there are hereby transferred to, and vested in, the Secretary all of the functions vested by law in the Administrator of the Federal Energy Administration or the Federal Energy Administration, the Administrator of the Energy Research and Development Administration or the Energy Research and Development Administration; and the functions vested by law in the officers and components or either such Administration.

(b) Except as provided in title IV, there are hereby transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 402(a)(2) to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

(Aug. 4, 1977, P. L. 95-91, Title III, § 301, 91 Stat. 577.)

To comply with the requirement of U.S. Sup. Ct. R. 28.1, the following disclosure on behalf of Respondent, Rockwell International Corporation, is made:

*This list contains all direct and indirect active subsidiaries of Rockwell (other than wholly owned subsidiaries) and active companies of which Rockwell directly or indirectly owns between 20 percent and 50 percent. A.C.S. Engineering Limited, United Kingdom; Arpel S.A., France; Autonetica, S.A., Mexico; Braseixos S.A., Brazil; Brasprensas S.A., Brazil; Collins Radio Company of Japan Limited, Japan; Compagnie Industrielle de Mecanismes S.A., France; Componentes Automotrices Rockwell-Standard y Compania Limitada, Chile; Dina Rockwell Nacional S.A., Mexico; Draper de Mexico S.A. de C.V., Mexico; Ikegai-Goss Co. Ltd., Japan; Industrias Teluo S.A., Spain; Metalurgica Carabobo, C.A., Venezuela; Moligal Productora de Assentos de Automovel, Limitada, Portugal; Phi-Magnetronics Limited, United Kingdom; Rockitt, Ltd., U.S.A.; Rockwell Cerdans, S.A., Spain; Rockwell Standard of Australia Limited, Australia; Rockwell-Standard de Venezuela, C.A., Venezuela; Rockwell Valves S.A., France; Rockwell Walther Australia Pty. Limited, Australia; Rubery Owen-Rockwell (Europa) B.V., Netherlands; Rubery Owen-Rockwell Limited, United Kingdom; S.A.S.E.B. AG Eschen, Liechtenstein; Serrature Auto Ferroviarie Edili S.p.A., Italy; SETEC, S.p.A., Italy; Tamet Compania Anonima, Venezuela; Telehoist Humblet, N.V., Belgium; Telehoist Storer Limited, United Kingdom; USHA Telehoist Limited, India.